S. Hrg. 99-973

ATTORNEYS' FEES FORFEITURE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

FORFEITURE OF ASSETS INTENDED FOR
USE AS ATTORNEYS' FEES

MAY 13, 1986

Serial No. J-99-106

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

64-197 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-15

64-197 O - 86 - 1

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

Dennis W. Shedd, *Chief Counsel and Staff Director*
Diana L. Waterman, *General Counsel*
Melinda Koutsoumpas, *Chief Clerk*
Mark H. Gitenstein, *Minority Chief Counsel*

CONTENTS

STATEMENTS OF SENATORS

	Page
Specter, Hon. Arlen	1
Metzenbaum, Hon. Howard M	2
Thurmond, Hon. Strom (chairman)	82
Grassley, Hon. Charles E	276

CHRONOLOGICAL LIST OF WITNESSES

Trott, Hon. Stephen S., Assistant Attorney General, Criminal Division, U.S. Department of Justice	3
Richardson, Elliot L., on behalf of the Criminal Law Section, American Bar Association, Washington, DC, accompanied by William W. Taylor III, Zuckerman, Spaeder, Goldstein, Taylor, & Kolker, Washington, DC	81
Sonnett, Neal R., third vice president and legislative chairperson, National Association of Criminal Defense Lawyers, Washington, DC	148
Panel consisting of Edward F. Marek, Federal public defender, Northern District of Ohio, Cleveland, OH, on behalf of the Federal Defender Legislative Subcommittee; and Kathleen F. Brickey, professor of law, Washington University School of Law, St. Louis, MO	223

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Brickey, Kathleen F.:	
Testimony	242
Prepared statement	244
Response to questions	273
Marek, Edward F.:	
Testimony	223
Prepared statement	225
Response to questions	240
Richardson, Elliot L.:	
Testimony	81
Prepared statement	85
Resolution and report from the American Bar Association	97
United States of America v. *Ronald Burnell Bassett and Clarence Meredith*, filed April 11, 1986	102
United States of America v. *Christopher F. Rechmeyer II, et al*	121
Memorandum from the Administrative Office of the U.S. Courts, regarding Gramm-Rudman-Hollings	133
Response to questions of Chairman Thurmond from the American Bar Association	135
"Risky Business: The Hazards of Being a Criminal Defense Lawyer," by William J. Genego	138
Simon, Hon. Paul:	
Opening statement of Senator John Kerry	8
Statement of Senator Kerry excerpted from the Congressional Record, February 3, 1986	9
Sonnett, Neal R.:	
Testimony	148
Prepared statement	151
"Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense," by William J. Genego	163
Briefs	175, 185, 198

Page

Sonnett, Neal R.—Continued
Analysis and recommendations on the Comprehensive Forfeiture Act of 1984 206
Responses to Senator Biden's questions 214
Additional questions answered 220
Trott, Hon. Stephen S.:
Testimony 3
Prepared statement 20
Response to questions of Chairman Thurmond 34
Response to questions of Senator Leahy 41
Bluesheet regarding policy with regard to forfeiture of assets which have been transferred to attorneys as fees for legal services 48
Response to questions of Senator Biden 64
Additional statement of Phylis Skloot Bamberger for the Federal Defender Legislative Subcommittee on behalf of the Federal Public Defenders 73

ATTORNEYS' FEES FORFEITURE

TUESDAY, MAY 13, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Metzenbaum, Specter, Simon, McConnell, and Grassley.

Staff present: Terry Wooten, counsel; Neal Manne, counsel; Edward Correia, minority counsel; and Mark Contreras, minority legislative assistant.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Good morning, ladies and gentlemen. The hearing of the Judiciary Committee will proceed on the subject of forfeiture of assets intended for use as attorneys' fees.

Chairman Thurmond is opening the Senate, in line with his duties as president pro tempore, and has asked me to begin the hearings. Senator Thurmond will be joining us shortly to preside.

The issue of forfeiture of assets intended for attorneys' fees is a very important issue. There are a number of cases on this subject considering the important sixth amendment constitutional issue on right to counsel and right to pay attorneys.

It is a subject that I have had some familiarity with as a prosecuting attorney when I was district attorney of Philadelphia. It is a matter which has importance in the fight against organized crime, but there are also some very substantive and significant issues of constitutional rights involved.

The research which we have conducted shows that of the seven courts which have considered this issue, two have accepted the Government's position; five have rejected the Government's position.

The Department of Justice, as I understand it, has issued new guidelines restricting the applicability of the seizure, requiring that the forfeiture request must be approved first in Washington by the Department of Justice, and second that the Government must have reasonable grounds to believe that the lawyer had actual knowledge of the forfeitability of the particular asset at the time of the transfer.

Whatever the judicial decisions may be, of course, the Congress has the plenary power to modify the law and to set the public

policy as the Congress sees fit, in accordance with law, and the President's action, obviously, on approving the legislation.

At this time, we will turn to our first witness, the distinguished Assistant Attorney General who is in charge of the Criminal Division, Hon. Stephen S. Trott.

Before we commence with Mr. Trott's testimony, we will, in accordance with our practice, turn for opening statements, and I am joined this morning by the distinguished Senator from Ohio, Senator Metzenbaum.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman. I am very much concerned about this issue and, as the chairman knows, when Senator Denton has attempted to move a bill having to do with forfeiture in espionage cases, I have not been willing to have that bill come out of committee until we have concluded how this particular issue should be resolved.

I have difficulty in comprehending, and will hope that Mr. Trott will explain to us in elementary terms, why the Government feels that any individual should be deprived of the right to counsel.

It is not a question of whether they are or are not guilty. Maybe I am misinterpreting the Government's position, and if I am, I hope that I am, but I feel very strongly about this issue. I feel that the person accused of the most heinous crime is entitled to a lawyer to represent him or her, and that a lawyer should not have to make a decision as to whether or not he or she is going to be losing his or her fee by representing the particular individual in the event the party is found guilty. I do not think the lawyer ought to be put in that position.

It is my view that we could draft language, which I am inclined to do, which would provide perhaps a middle ground, that middle ground being that the court in disposing of the case or in post-trial hearing or at some appropriate point after the finding of guilty had been made—assuming there was forfeiture provided for—the court at that point could allocate to counsel a reasonable fee.

I think that that might be a solution that everybody could live with, and if it is not, I would hope that our witnesses today would indicate why that kind of a solution would not be satisfactory.

As I understand it now, the question as to whether the attorney does or does not get the fee relates directly to a sort of bureaucratic determination made by one of the parties to the litigation, the U.S. Government.

I would appreciate the witnesses today commenting on this approach, which I do not have spelled out in language; it is merely a thought in my head at the present moment.

Mr. Chairman, thank you very much.

Senator SPECTER. Thank you, Senator Metzenbaum, and now we turn to Assistant Attorney General Trott.

STATEMENT OF STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. TROTT. Thank you, Mr. Chairman, members of the committee. I have submitted a statement; with your permission, may it be received in the record?

Senator SPECTER. It will, without objection, be made a part of the record in full.

Mr. TROTT. Thank you very much.

If I just may begin without referring to the statement itself, let me assure you, Senator Metzenbaum, in connection with your first question that the Department of Justice has no interest at all in depriving anybody charged with a crime of his or her right to counsel under the Constitution.

That is not an issue; we do not see it as an issue. That is not our goal, that is not our objective, and that would not be the byproduct of the program that we have in place.

If I may, let me just give a few seconds on the context of what we are talking about, because I think that that is very important to understand what we are doing and exactly why we are doing it.

We have now, according to the law passed in the Comprehensive Crime Control Act of 1984, better options with respect to assets accumulated by racketeers and drug traffickers, and that is what we are really talking about.

We have one objective, and one objective only, from which all else flows, and that is to protect the families and the children of America and the American way of life from the ravages and destruction of drug abuse and racketeering by putting drug traffickers and racketeers out of business permanently, and not just in nice neighborhoods where everybody lives, but in all neighborhoods where all Americans live.

This is the goal of the Asset Forfeiture Program, and of RICO and of CCE, to hit drug traffickers and racketeers where they live, in their bank accounts, in their investment portfolios, and in their mind-boggling accumulation of wealth in whatever form it appears—mansions, yachts, Lear jets, racehorses, or businesses.

Senator METZENBAUM. Mr. Trott, I do not want to interrupt you, but that is really a good speech. Let us talk about the right of the defendant to have a lawyer, which is really the issue before us.

We all want to hit racketeers and drug dealers every bit as much as you do, and we are not talking about their luxury yachts. We are talking about their right to have counsel.

Senator SPECTER. Senator Metzenbaum, let us proceed to let Mr. Trott make an opening statement, and then we will proceed with some questions. But let us give him a chance to make a statement.

Mr. TROTT. Thank you, Mr. Chairman. I was simply trying to provide the Senator with the context, and if I may, then, let me get directly into what we are talking about.

As a principle of vigorous, goal-oriented law enforcement, we believe that just as car thieves should not be allowed to keep and use the cars that they steal, and just as white-collar criminals must be required to pay restitution to their victims with interest—not give the money that they steal to their lawyers—so too, drug traffickers and other successful racketeers must not be allowed to keep, to

profit from, or to use to their advantage the blood money that they make as a result of racketeering or drug trafficking.

To that end, asset forfeiture really is what I call the thermonuclear tool of today. It takes the money that is being accumulated by successful criminals and says to them,

> This money belongs not to you; you cannot use it for anything; it belongs to the people of America who are victimized by your activities.

Let me get directly, then, into a discussion of the statutes themselves. When the statutes providing for the forfeiture of assets as a penalty for violations of RICO and CCE statutes originally were enacted, it was unclear whether the so-called relation-back doctrine would apply to forfeitures under those statutes.

This doctrine had developed principally with respect to civil in rem forfeitures. It provides, as the committee knows, that once the Government proves that particular property is forfeitable—in other words, it comes from criminal activity—the Government's title to it relates back to the commission of the act giving rise to the forfeiture.

What this says is the crook never owned this in the first place. In practical terms, that means if a wrongdoer acquires an ill-gotten asset by committing a continuing criminal enterprise or a RICO offense and thereafter transfers it to a third party, any third party, the Government is entitled to take the property from the third party.

The theory is that since the Government's title relates back to the time of the commission of the offense, the wrongdoer had no title which he could convey to the third party. Now, it is recognized that this result could be very unfair to an innocent third party, and therefore the civil forfeiture statutes allow an innocent third party to defeat the Government's claim, in the interest of fairness.

The Comprehensive Crime Control Act of 1984 revised the criminal forfeiture penalties of the CCE and RICO statutes to implement the relation-back doctrine with respect to forfeiture under those statutes. This amendment effectively overruled those cases in which it held that criminal forfeiture did not relate back.

The need to apply the relation-back doctrine to criminal forfeitures was amply demonstrated at the time the amendments were enacted. As explained in the Senate report,

> Absent application of this principle, a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction.

It was the intent of the Senate, clearly, to tell drug traffickers and racketeers, this is not yours and we are not going to give you an opportunity to defeat this law by transferring title to some other person.

Now, as I noted, the impact of the relation-back doctrine upon third parties admittedly can be very harsh. Therefore, as an equitable matter, the criminal forfeiture statutes were also amended to allow a third party, any third party, to set aside a forfeiture of assets transferred to him.

The equitable relief provisions are the same as those provided in civil forfeiture statutes. In order to set aside a criminal forfeiture, the statutes require a third party to prove that he was a bona fide

purchaser and that he was reasonably without cause to believe that the property was subject to forfeiture when he received it.

This protects people who accept property from somebody not knowing where it comes from or who they are dealing with, and as I said before, it is done in the interest of fairness.

The ability of Government to forfeit assets transferred to an attorney by a CCE or RICO defendant was substantially increased by these amendments because they provide the Government with authority to forfeit assets transferred prior to conviction.

Prior to the amendments, fees paid prior to conviction generally were immune from forfeiture. Now, if the Government proves that an attorney's fee, in fact, was paid with the instrumentality or proceeds of the offense, the attorney is entitled to keep the fee only if he can prove that he was both a bona fide purchaser and did not have reason to believe that the assets were tainted.

In essence, this places attorneys on the same footing with all other third-person parties who come into possession of the fruits of racketeering and drug trafficking.

Since the amendment of the CCE and RICO forfeiture statutes, a number of attorneys representing CCE and RICO defendants against whom forfeiture counts have been charged have filed motions asking the district courts to rule that any assets they receive from representing the defendants are exempt from forfeiture.

In at least two cases, the district courts granted such motions and held that any property or money paid to an attorney by a RICO or a CCE defendant is forfeitable only if the transaction is a sham or a fraudulent transaction.

In effect, these courts have held that even if an attorney knows full well that he or she is receiving the proceeds of a drug or racketeering offense, the attorney nonetheless is entitled to keep these proceeds if they were paid to him as a legitimate attorneys' fee, whatever that is in this context.

We believe that it is inappropriate to exempt attorneys' fees from the scope of this law. We believe that the position that they should be exempted is flawed from a number of different viewpoints.

Now, the only assets that we are talking about which can be forfeited are those which, in fact, are the instrumentalities or the fringible proceeds of a drug or racketeering offense. Thus, to the extent that a person receives assets from a wrongdoer and is allowed to keep them, he is being allowed to enrich himself, at least indirectly, as a result of those criminal activities.

We agree that it is fair and equitable to allow someone who parts with value and who does not know that he or she is receiving the fringible proceeds of criminal activity to keep the property.

However, Congress, the American people, and we all agree that drug and racketeering activity is a cancer that threatens the fabric of our society. It thrives on the profits which it generates at tremendous cost to our national well-being. Thus, it is offensive to allow people who deal with drug dealers and racketeers to knowingly enrich themselves with drug money, knowing that the money is derived from that activity. The fact that the recipient of these moneys is an attorney, in our view, does not change this conclusion.

We think that it affronts our basic ideas of right and wrong to argue that anybody, including a lawyer, is entitled to keep this kind of money. Essentially, what we are saying—and if I may address your idea that somehow you can exempt a reasonable attorney's fee from this—essentially, what that argument would lead to, Senator, is to say that an economically productive criminal enterprise, as compared to one that fails, is entitled to be used by those people who run the economically productive criminal enterprise to finance their defense on behalf of the Government, because that money belongs essentially to the Government.

But what about the economically unproductive, criminal enterprise? Those are persons who rely on appointed lawyers under the Criminal Justice Act or other systems, and what we are saying is that all criminal enterprises, drug dealing, and racketeer enterprises will be unproductive because the money they earn comes from crime and it does not belong to either the enterprise or any of the drug traffickers or dealers.

Senator METZENBAUM. The wealthy racketeer could not get——

Senator SPECTER. Well, wait just a minute, Senator Metzenbaum. Let Mr. Trott finish because I have some questions.

Senator METZENBAUM. He was speaking to me.

Senator SPECTER. Well, let him finish his statement.

Mr. TROTT. From a practical standpoint, we are concerned that exempting attorneys' fees undermines substantially the effect of the forfeiture penalties as economic disincentives to drug and racketeering activity.

It may not be possible to satisfy a forfeiture judgment from a defendant's legitimate assets if he has dissipated the illicit assets. Consequently, if attorneys' fees are exempt from forfeiture, a defendant would have every incentive to pay his attorney with the illicit assets and retain only legitimate assets that he might have at his disposal.

The result would be that the Government would be unable to satisfy a forfeiture judgment, and at the same time the defendant would realize the full economic benefit of his misconduct by bartering the ill-gotten proceeds for legal services. This would undermine the forfeiture in the statute completely.

Now, because there are very substantial reasons for not exempting attorneys' fees, we believe they should not be exempt unless there is some compelling reason to do so. It has been argued that the sixth amendment guarantee of the right to counsel is just such a reason, and indeed requires that fees be exempt from forfeiture. We do not believe that this argument can withstand scrutiny.

Forfeiture of attorneys' fees potentially implicates two guarantees under the sixth amendment. First, a defendant has a right to counsel in any criminal proceeding which might result in his imprisonment. This right is absolute and cannot be abridged in any fashion.

Second, a defendant who is financially capable is entitled to retain counsel of choice. This right of counsel is qualified and is not absolute and depends on the economic power of the person in question. The courts have held that it may be restricted when there is a significant countervailing public interest.

A defendant's right to counsel of choice is not necessarily violated by the application of the forfeiture provisions to attorneys' fees, and therefore the right itself neither justifies nor requires that there be an exemption from forfeiture for attorneys' fees.

As I mentioned, this right to counsel is qualified, and one of the chief limitations is simply economic. A defendant is entitled to counsel of choice only if he has the funds to pay that counsel.

Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney. A corollary of this is that a defendant does not have a right to Government funds to pay for chosen counsel. There is no right to that.

Yet, that is precisely what is being pressed as a rule of constitutional law when it is argued that forfeitable assets paid to an attorney must be exempt from forfeiture. The fact is that a defendant is divested of any title he may have to forfeitable assets when he is convicted, and title passes to the Government.

Moreover, in the case of forfeitable proceeds generated by the crime itself, such as loan-sharking, bribery, and drug trafficking, the relation-back doctrine means that a defendant is not just divested of his interest, but that he never acquired any interest in the property in the first place. It did not belong to the drug trafficker or the racketeer to dispose of.

It is true that prior to conviction, it has not been proven that a defendant's assets are ill-gotten. It is argued that, in view of this, a defendant prior to conviction has a right to use any funds, even those alleged to be forfeitable, to hire counsel.

However, as noted above, several courts have held that a preconviction restraint of funds alleged to be forfeitable is proper, even in the face of a claim that they are needed to pay counsel.

The rationale underlying these decisions is that the Government has a significant and compelling interest in preserving assets that are shown by a probable cause standard to be forfeitable.

It is true that this warning may cause some lawyers to decline to represent a CCE or a RICO defendant, but this does not result from any improper Government action, since the fee cannot be forfeited absent a proof that it is, in fact, from tainted funds.

Rather, it stems from the natural caution that anyone might exercise in deciding not to deal with a defendant facing a CCE or RICO charge unless there are reasonable assurances that any money received is from a legitimate source.

Thus, the only restriction on a defendant's use of funds prior to conviction to hire counsel is that the defendant must assure his attorney, to the attorney's satisfaction, that the fee is collectible and comes from a safe source. That is no different than any attorney-client relationship.

Now, we have, however, recognized that we are treading on very delicate ground. We have tried to be thoughtful about this and we have met on occasion with defense attorneys not only to discuss constitutional issues, but to discuss the everyday, work-a-day problems that arise in the kinds of relationships that we are talking about.

We have devised in the Department of Justice guidelines to lead us on our path in handling this sensitive problem, and I think

these guidelines clearly indicate that we are not up to anything that would deprive a person of his or her right to counsel.

Essentially, the guidelines say that we will not attempt to forfeit any moneys paid to somebody as an attorney's fee unless it can be proved based on the evidence that is before us that this money was taken by the lawyer knowing that it was forfeitable, knowing that it was the fruit of criminal activity such as drug trafficking or RICO.

So, essentially, we are saying to lawyers, you have nothing to worry about unless you knowingly accepted this money believing or with reason to believe that it was from criminal activity. And under those circumstances, you are in the same place as everybody else

So I really think that what you are talking about here is not as much the Constitution as you are talking about the solvency of people charged with crimes, and you are talking about business decisions by lawyers with respect to whether or not to handle the case of a client based on whether or not the client can pay. Congress has said you cannot pay for your lawyer with money that you have squeezed out of the American public by racketeering or drug trafficking.

I thank you for allowing me to make this opening statement. I would be pleased to answer any questions that you might have of me.

Senator SPECTER. We have been joined by Senator McConnell. Senator McConnell, do you have an opening statement?

Senator MCCONNELL. No, thank you, Senator Specter. I simply want to listen to the testimony of this excellent group of witnesses.

Senator SPECTER. Thank you, Senator McConnell.

Senator SIMON. Mr. Chairman?

Senator SPECTER. Oh, excuse me. Senator Simon has joined us, too.

Senator SIMON. I do not have an opening statement, but Senator Kerry has a statement that he would like to have inserted in the record.

Senator SPECTER. Without objection, it will be inserted in the record.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR JOHN KERRY

Mr. Chairman, I am pleased that the Senate Judiciary Committee is holding this hearing on the subject of fee forfeitures and related issues. This is an important subject which deserves careful scrutiny. I commend you for convening this hearing, and calling attention to this subject.

As a former prosecutor, and as an attorney, I have been deeply concerned by this Administration's efforts to undermine the right of all citizens to the effective assistance of counsel, which is guaranteed by the Sixth Amendment to the Constitution. This is a problem of concern not only to the legal community, but to all Americans who value our Constitutional protections.

I recently delivered the keynote address at a national conference held at Harvard Law School, focusing on this important issue. I ask permission that the text of my remarks be inserted in the record of this hearing.

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 99th CONGRESS, SECOND SESSION

Vol. 132 WASHINGTON, MONDAY, FEBRUARY 3, 1986 No. 8

Senate

RIGHT TO COUNSEL

SENATOR JOHN KERRY: KEYNOTE ADDRESS, CONFERENCE ON DEFENDING THE RIGHT TO COUNSEL

I am delighted to be here today. As a former prosecutor and former criminal defense lawyer, it is a pleasure to be able to participate in this forum with a group of such distinguished colleagues.

The topic of this conference, defending the right to counsel, is both timely and important. I am reminded of William Shakespeare's play, Henry VI, Part II, in which he has one of the villains boast that when the rebellion succeeds, "The first thing we do, let's kill all the lawyers." Some people think that is what the Reagan administration is trying to do today. Perhaps it would be worth remembering that in the Shakespeare play, the idea of killing the lawyers was suggested as a means of producing anarchy, not as a way of solving society's problems.

However, to paraphrase another quote from Shakespeare, I come here to praise lawyers, not to bury them. I come to praise all of you for the efforts that you are making to defend the right to counsel, and to pledge my support and solidarity with those efforts.

Unfortunately, not everyone in the current administration agrees with this point of view. Today, the right to "effective assistance of counsel", guaranteed by the sixth amendment to the Constitution, is under attack as never before. Examples of these attacks are all around us, and all of you are familiar with them. The weapons used in these assaults on the right to counsel include subpoenas issued to lawyers which order them to provide testimony and documents containing incriminating evidence against their clients to the grand jury. They include search warrants permitting Government officials to raid attorney files in the search for incriminating evidence against their clients. We have seen the use of spies and electronic surveillance to discover the contents of attorney-client meetings and conversations. The Justice Department has used the recently enacted criminal forfeiture statute to seize attorney's fees. And, most dangerous of all, this administration has begun to prosecute attorneys for nothing more than the vigorous defense of their clients.

These pernicious tactics serve several objectives of this administration. One of the principal objectives is the destruction of the attorney-client privilege, which is the oldest privilege at common law. They have attempted to undermine the confidentiality of attorney-client conversations and correspondence. These tactics had the effect of creating a "chilling effect" on client disclosures to lawyers, and of turning lawyer and client against each other by creating conflicts within the attorney-client relationship; and directly threatening attorneys with the deprivation of their livelihood, or even with jail.

If there are those who believe that these are only idle threats, consider the case of a courageous Boston attorney, Barry Wilson.

Mr. Wilson, a member in good standing of the Massachusetts and Boston Bar Associations, spent approximately 4 months of last year in the Federal Correctional Institution in Danbury, CT. His crime? Vigorous defense of his client, and of his client's sixth amendment right to counsel.

Actually, Mr. Wilson was never convicted of any crime. He was sent to jail for refusing to answer the questions of a Federal grand jury in Rhode Island that was investigating his client's alleged role in a drug-smuggling operation. The U.S. attorney for Rhode Island claimed that the communications between Mr. Wilson and his client came under the so-called crime-fraud exception and therefore were not privileged. Mr. Wilson argued that to disclose confidential attorney-client communications would violate his client's constitutional rights, and the attorney-client privilege. It would also have had the not-so-incidental effect of destroying Mr. Wilson's ability to earn a living as a criminal defense lawyer. It seems that the Justice Department has systematically singled out the most effective criminal defense attorneys for special attention in this regard.

Barry Wilson had the courage of his convictions, and was willing to go to jail for them. But his example serves as a chilling reminder to the legal community of what can happen when the power of the Justice Department is not held in check.

These assaults on the criminal defense bar are just part of the broader background of this Justice Department under the Reagan administration. They are part of a larger disrespect for the very process of law contained in the Constitution, and dating back to the English common law. This administration has attacked the very foundations of the attorney-client privilege. Three hundred years of law have developed the importance of this privilege. Countless law review articles have been written about it, and the Supreme Court has affirmed its importance many times. But under "Reagan justice", this privilege has begun to erode.

In the name of fighting crime, this administration has placed the Constitution in a secondary position. The short-term rewards of this strategy are tempting, but the long-term implications are enormously destructive.

The basic dilemma inherent in this debate was stated succinctly by senior circuit judge David L. Bazelon in a law review article in 1981, entitled: "The Morality of the Criminal Law". Judge Bazelon, focusing on the Reagan Administration's efforts to combat crime by eroding the protections of the fourth, fifth, and sixth amendments, posed the question: "Must we compromise the most basic values of our democratic society in our desperation to fight crime?" His answer, and mine, is no.

As Judge Elbert Tuttle has written: "The only way the law has progressed from the days of the rack, the screw, and the wheel is the development of moral concepts." These moral concepts include the right to effective assistance of counsel, and the protection of the attorney-client privilege.

Under our judicial system, accused persons are guaranteed the right to have counsel, because this is a right upon which all other rights in the Bill or Rights depend. It would be fundamentally inconsistent with the sixth amendment if the Government could convert this basic right into a legal minefield which, instead of protecting the client, would become the source of his destruction. Surely this was not the intent of the framers of the Constitution.

In the past 5 years, since President Reagan took office, there have been an enormous number of cases reported around the country where prosecutors were seeking information from lawyers about their clients. Attorneys who have researched this issue have found that 10 years ago, there were very few of these type of cases reported; 15 years ago, they could be counted on the fingers of one hand. But today, they are becoming commonplace.

There is a movement by the Government

today to go to attorneys as one of the first sources of information about their clients, instead of the last. After all, attorneys are an easy mark. They are bound by ethical standards, compelled to tell the truth, and they know a lot.

The Reagan Justice Department quickly realized that attorneys were a valuable source of information about their clients. And the administration has been very clever in starting their erosion of the attorney-client privilege by trying to get information on client fees. Fees, after all, are a discrete aspect of the privilege. Some may ask, "What is the harm in requiring an attorney to report information about fees paid by clients? Couldn't this information be useful to law enforcement officials in detecting criminal activity?" But the answer is not so simple. Perhaps there are times when it is appropriate to require reporting of information about fees. But where do you draw the line? As all of you know, it is not so easy to draw a "bright line" between protected and unprotected information.

In some cases, information about clients' fees may tend to incriminate the client. But the client has a right to believe that his interests and the attorney's are one and the same for the purposes of representation. That client should not be forced to choose between his rights under the fifth amendment, or his right to counsel under the sixth amendment. He should not have to choose between giving up his attorney, or his right against self incrimination.

And once we start down this slippery slope, where do we stop? When we start allowing our constitutional protections and common-law traditions to erode, it is difficult to see where that process will end.

I fear that what we have seen so far is only the tip of the iceberg. As many of you know, the U.S. Attorney for Massachusetts has recently filed suit to enjoin a rule promulgated by the Supreme Judicial Court of Massachusetts which would protect attorneys against arbitrary subpoenas to a grand jury without prior judicial approval. In the course of that proceeding, the U.S. attorney filed an affidavit indicating that, last year, he filed 50 subpoenas to attorneys. Of these, only three were challenged by motions to quash, and only these three received judicial attention. What this may indicate is that many attorneys are succumbing to this form of intimidation, and are not vigorously protecting their clients' confidences.

In fact, these subpoenas and other forms of intimidation have a profound effect on how attorneys must think when they represent a client. An attorney must ask himself or herself, "Am I protecting myself?" instead of focusing on the interests of the client. The time, energy, attention, and resources of the attorney are diverted from the representation of the client to self-protection by the attorney, to the detriment of both attorney and client.

Some of the courts have also contributed to this process or erosion. In a recent case here in the first circuit, *United States* v. *King*, a Government agent working for the FBI was planted in the courtroom with a hidden microphone, which he actually placed between the defense attorney and his client. He also took a bugging device into the courthouse lockup to record conversations between the attorney and his client.

The court ruled that the attorney had not shown any concrete evidence of prejudice to his case as a result of these actions, and said that the law would not provide a remedy unless such a showing was made. This ruling in effect gives the green light to prosecutors to engage in wiretapping and bugging of opposing counsel. For the U.S. Government to employ these kind of tactics brings to mind an earlier chapter in our history, one that many of us hoped had been permanently closed—the era of Richard Nixon, John Mitchell, and Watergate.

At present, these tactics have been employed primarily against attorneys in cases involving drugs, organized crime, of politically unpopular defendants. But it appears that prosecutors are now coming to view buggings, informants, subpoenas, free seizures, and jail sentences as weapons in their arsenal to be used against any attorney who has the temerity to represent a defendant in a criminal case. These tactics are more reminiscent of those used against defense lawyers in certain totalitrian countries, than anything in the American tradition.

More than 170 years after the adoption of the sixth amendment, the Supreme Court's landmark decision in Gideon v. Wainwright breathed life into the right to counsel by assuring representation for indigents in State trials. The Gideon decision in 1963 was a great step forward toward the goal of equal justice for all in America. But today, under "Reagan Justice", we are seeing steps in the other direction.

Criminal defense attorney John Wall, a former Federal prosecutor, has commented that "for 200 years in this country we have made some judgments. You get 'em fair. You don't use the rack to get confessions, you don't call a priest to testify against a penitent, and you don't call lawyers to testify against their clients."

But the Reagan administration is trying to change the rules. They have demonstrated in many ways their disregard for the traditions of an independent judiciary, a strong private bar, and for the role of Government in assuring equal rights for all Americans. They have even tried redefine the meaning of the Constitution of the United States.

Recently, Attorney General Edwin Meese called for a jurisprudence of "original intention". What Mr. Meese meant by this, apparently, was the judges and Supreme Court Justices should decide consitutional questions on the basis of the "original intention" of the Founding Fathers, rather than on the basis of their own view and opinions. On the face of it, this is a proposition to which no one could object. But like so many of the pronouncements emanating from this administration, this one contains more that a small element of "doublespeak".

The truth is, as historian Henry Steele Commager has pointed out, that the Founding Fathers were wise enough to realize that they could not foresee every eventuality, and were farsighted enough to couch their intentions in terms which would be open to future interpretation. The Founding Fathers understood that it would be impossible to foresee all of the possible contingencies that might arise in the future, and, in their wisdom, they wrote in general terms which would give guidance to future generations of lawmakers without shackling them to the 18th century.

For an Attorney General today to presume that he understands the "original intention" of the Founding Fathers better than the generations of lawmakers, Justices, and constitutional scholars who have come before him is indeed, as Justice William Brennan put it, "Arrogance cloaked as humility".

It does not require a great constitutional scholar, though, to discern the "original intention" behind such phrases as "equal justice under law", "effective assistance of counsel", or "liberty and justice for all". Surely these eloquent phrases speak for themselves. If they mean anything, they must mean that all of our citizens must have equal access to our system of justice.

This administration has repeatedly tried to deny that access by denying the right to counsel to those who are weak or politically unpopular. One means by which they have tried to achieve this objective is by attempting to eliminate the Legal Services Corporation. They have repeatedly proposed to eliminate all funding for that organization. Failing that, they have appointed members to the Board of LSC who have advocated crippling cuts and major changes in the services provided, which would seriously damage the ability of LSC to provide legal services to the poor.

They have also adopted a new tactic—conducting raids on legal aid offices around the country. These raids have included wholesale rifling of confidential files, resulting in violations of the attorney-client privilege. They are very similar, in fact, to some of the raids which have been conducted against criminal defense attorneys.

The purpose of the raids on legal aid offices is ostensibly to conduct "audits" and "monitoring" of legal aid lawyers. But the real purpose of these raids is the same as the purpose behind the harassment tactics directed at the criminal defense bar. That purpose is intimidation, and destruction of the attorney-client relationship.

This administration has attempted to stack the deck in their favor in many ways. Perhaps the most insidious are their attempts to hand-pick a Federal judiciary which will guarantee, in advance, the results which Mr. Meese and company wish to achieve.

I have been deeply concerned by this administration's approach to judicial nominations. President Reagan seems to be determined to leave as his legacy a judiciary composed of Federal judges who share his conservative views. But what kind of legacy will it be? In his first 5 years, President Reagan made 224 appointments to the Federal Judiciary. Of these, only 13 were members of minority groups, and only 19 were women. By contrast, President Carter appointed 40 women, and 55 minority judges, during his 4 years in office, out of a total of 258 appointments. The fact is, President Reagan's record on judicial appointmental is a disgrace.

Throughout two centuries, our Federal judiciary has been a model institution, one which has insisted on the highest standards of conduct by our public servants and officials, and which has survived with undiminished respect.

Today, I fear that this institution is threatened in a way that we have not seen before. The threat endangers the fundamental integrity of our judiciary, and thus the quality of our entire system of justice. It risks undermining the respect that we have always maintained for our judiciary, and even the balance of powers as set forth in our Constitution.

This threat is that of the appointment of a judiciary which is not independent, but narrowly idelogical, through the systematic targeting of any judicial nominee who does not meet the rigid requirements of litmus tests imposed by the far right.

We are seeing attempts to prejudice justice itself through the exclusion of any candidate for a judgeship in the Federal courts who does not commit himself or herself to the narrow political beliefs of the right wing of one of our Nation's two political parties. I am sorry to note that there are some of my colleagues in the U.S. Senate who have been at the forefront of this effort to mold the judiciary. I am even sorrier to note that their efforts are supported by the Attorney General, and the President of the United

States.

Our judiciary is too important to permit anyone to compromise its independence or integrity, yet that could well be the result of these current efforts. In my view, the advice-and-consent role of the U.S. Senate is too important to be abdicated. We need to pay closer attention to judicial nominees from here on. If it takes more time, it takes more time. But it will be time well spent. This Nation cannot afford to give a blank check to the extremists of one party, to hand over to them the ability to shape the nature of our judiciary well into the next century.

Fortunately for all of us, there are still some voices of reason and restraint to give us guidance on these difficult issues. And, as usual, the State of Massachusetts is leading the rest of the Nation in progressive thought. As I mentioned earlier, the Supreme Judicial Court of Massachusetts has recently promulgated a rule which requires prior judicial approval before a prosecutor can issue a subpoena against a lawyer for information about a client. This rule is a direct response to the abuses of the Reagan-Meese Justice Department. And needless to say, the Justice Department has filed suit to try to enjoin the Massachusetts rule, and prevent it from becoming a model for other jurisdictions.

But other States would do well to emulate the example of Massachusetts. The American Bar Association has now recommended the adoption on a national basis of a rule like the one first adopted by the Massachusetts bar.

Under the new rule in Massachusetts, all prosecutors would be required to obtain a ruling from a judge indicating that the information they seek is not privileged and is necessary to the investigation. In Massachusetts, issuing a subpoena to a lawyer without prior judicial approval is now officially what it is in fact—an unethical practice.

Let me emphasize that this rule is not an impediment to aggressive, effective prosecution. But it does prevent the abuse of subpoena power by the prosecution.

It might be appropriate at this point for me to mention that I was once a prosecutor in Massachusetts myself. For several years, I was the first assistant district attorney of Middlesex County, the largest county in Massachusetts. I was in charge of the administration of the district attorney's office, and I am very proud of what we were able to achieve. I led an investigation and successful prosecution of organized crime in Massachusetts. We also started a rape counseling program, a victim-witness assistance program, an organized crime unit, and a white-collar crime unit. And we were able to dramatically cut down on the backlog of criminal cases.

As a prosecutor, I won my share of cases, and I put my share of criminals behind bars. But I did it fairly. I played by the rules. I didn't find it necessary to wiretap the defense counsel, to subpoena opposing counsel and try to turn them into government informants against their clients, or to seize their hard-earned legal fees. I didn't find it necessary to throw an opposing lawyer in jail in order to win a case against his client. We never even considered those kind of underhanded tactics. And let me add that we were able to fight crime effectively without using those kind of tactics.

I've also seen it from the other side, as a criminal defense lawyer. When I was in private practice, I once represented a man who had been wrongly charged with murder, and was able to get him freed. I know from first-hand experience what Attorney General Meese does not—that not all those accused of crimes are in fact guilty of committing those crimes. When I was a criminal defense lawyer, I fought just as hard for my clients as I fought to get convictions when I was a prosecutor. That's what our adversary system of justice is all about—each side vigorously represents their client to the best of their abilities.

Because I've seen it from both sides, I think I understand the nature of our adversary system. And I know, as you do, that the greatest danger to our system of justice is to change the rules, as this administration is trying to do—to stack the deck in favor of one side and against the other. That's not justice, and that's not the American way.

At the same time, let me make it clear that I am in no way defending those lawyers who do cross over the line and knowingly become involved in criminal activities. I am not naive enough to think that there are not some lawyers who will turn a blind eye to their clients' involvement in drug deals, or organized crime. Some may even be actively involved in criminal conspiracies. I am not an apologist for those lawyers, nor should you be. Perhaps there are times when we should require lawyers to disclose the sources of their fees, when there is strong indication that criminal activity is involved. I am an advocate of strong and effective action against crime. And I think we need to recognize that the American public feels the same way.

Part of the reason why the public supports President Reagan is that they perceive him as being tough on crime. There is a feeling that courts have been more concerned with the rights of criminals than with the rights of victims. We need to change that. We need to take tough action against street crime, organized crime, and white-collar crime. But we also need to preserve our constitutional protections against those who would do away with them in the name of fighting crime. The American people elected Ronald Reagan, but they did not give him a mandate to make Clint Eastwood the Attorney General, or to appoint Rambo to the Supreme Court.

There is no doubt that, under this administration, the right to effective assistance of counsel is endangered in a way that we have not seen before. And with it, our adversary system of justice is in jeopardy. It may be that this is a problem which needs to be addressed by Federal legislation. The House Judiciary Committee has already held hearings on fee forfeitures and related issues, and the Senate Judiciary Committee will follow in the near future. While I am not a member of the Senate Judiciary Committee, I will follow those hearings with great personal interest. As a former prosecutor and criminal defense lawyer, I will ask the chairman of the committee for permission to testify personally before the Judiciary Committee about the threat to the right to counsel, and to the adversary system itself, which is being created by this administration's efforts. And if those hearings show a need for legislation on the Federal level, let me assure you that I will be the first to introduce it, and to fight for it.

As a U.S. Senator, I intend to continue to stand up for the individual civil liberties, for the right to counsel and for the constitutional rights of all Americans. I will continue to fight for an independent judiciary, and for a strong and independent private bar. I am going to fight for these things because I care deeply about these issues. I have been out there in the trenches with all of you. I have seen the criminal justice system from both sides, and I know how it's supposed to work. And that's the way I want to see it work—with full, fair, and vigorous advocacy, on both sides.

Ultimately, it comes down to all of use. Men and women of conscience, like yourselves, have an obligation to fight for the things that we believe in. If we want the system to work, we have to make it work. Each and every one of us has a role to play in that struggle. And if at times we get discouraged, and feel that we are fighting against the odds, we would do well to recall the words of a great American jurist, Judge Learned Hand:

"Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it."

Thank you.

Senator SPECTER. Mr. Trott, a concern which crosses my mind involves the determination by the Department of Justice of a number of facts leading to the determination procedure. Under the procedures which are in effect, notice is given to the defendant and the attorney, and then the issues have been raised in the court proceedings as to whether the seizure is appropriate.

Would it be preferable to structure some procedure where an application was made by the Department of Justice to the court under a set of standards analogous to a search and seizure warrant—and it really is a seizure—which would call for a judicial determination as to cause for the seizure?

You may get there in about the same way by having the issue raised by the lawyer after the seizure notice. But it strikes me, in accordance with a great body of preexisting law on seizure warrants, that that might be a more orderly way to proceed with an application being made by the Government.

There might be a difference of burden of proof in terms of the Government being required to show some standard of probable cause to justify the seizure. What would your thought be of that kind of a proceeding?

Mr. TROTT. Well, we would certainly be more than willing to study such a precise outline, and I think that anything that makes sure that we are, in fact, protecting legitimate rights of people to counsel is something that ought to be carefully looked at

But I would hope that we could do this without so tying the process in a knot in the interest of attorneys' fees that we would lose the ability to move expeditiously against the proceeds of the activity in question

In fact, I believe right now the courts seem to be exercising discretion somewhat in the nature of what you are describing when we are confronted with situations in which a defendant begins to complain that assets are tied up and those assets have to be made available for other purposes.

Senator SPECTER. Well, I think you may get there in a practical sense under existing procedures.

Mr. TROTT. Yes.

Senator SPECTER. But I would think that speed or expeditious treatment would not be a weighty factor, as contrasted to the sixth amendment.

What do you see as a problem if the application has to be made by the Government to the court as opposed to a defense being raised by the attorney?

Mr. TROTT. Well, I am afraid, among other things, we may get involved in very lengthy pretrial litigation, with appeals and all kinds of processes that——

Senator SPECTER. Do you not have that now?

Mr. TROTT. Well, I think that as this thing begins to settle out and as the U.S. Supreme Court takes a look at it, I think we will avoid that. We are in a learning period right now. Courts are going off in different directions, and I think within a matter of 1 year, 2 years, we should have a definitive response on this that will give everybody a clearer direction and will resolve a lot of the problems before trial without resulting in lengthy appeals.

Senator SPECTER. Well, I do not know. My instinct would be that whatever appellate processes there are, it would probably would be worth the time. But I pose that as an alternative as we work through this problem with you.

Another factor which crosses my mind which is of concern is the issue of the attorney-client relationship and the attorney-client privilege. The assertion which the Government is making here is that these are proceeds obtained in an illegal way.

That may really involve a minitrial or not a minitrial, maybe a full-scale trial or a full-scale factual determination as to what the defendant has done. When the attorney has the burden of coming forward to challenge the seizure proceeding, he or she is pretty much in the position of making certain disclosures. They have to make certain representations to file a petition.

I have not examined the legal papers, but it would not be surprising to require allegations of fact to be supported by affidavit.

What is the problem which you see here, if any, as to getting into attorney-client privilege? The attorney has to make certain assertions and representations of fact. Is the attorney going to be in jeopardy of making a false statement or of making some disclosure in that proceeding?

Mr. TROTT. Well, No. 1, we are not attempting to smoke anybody out from behind the attorney-client privilege. Let me just make that clear.

Second, I think that it is a legitimate concern. We do not want to put lawyers in a position in which they find it impossible to prove that, in fact, when they accepted the proceeds of drug trafficking as a fee, they did not know what they were accepting.

But just as you mentioned a few minutes ago with your observation that these things have a way of working themselves out, I think that is really what will happen here. Fee information generally is not considered to be privileged. This has been accepted for a long period of time under Federal law.

So, for openers, you are not talking about an area that in and of itself falls into the attorney-client privilege.

Senator SPECTER. Fee information is not privileged, but how about the issue of source of when you talk about actual knowledge on the lawyer's part? Who has to prove that under your guidelines that the lawyer did not have actual knowledge?

The Government must have reasonable grounds to believe the lawyer had actual knowledge of the forfeitability. Who has that burden of proof?

Mr. TROTT. Well, as it stands right now, the lawyer—in order to establish himself or herself as a BFP, the lawyer would have to come forward. But I think the important thing to remember is where you are along the line.

In the first instance, the Government would have to establish that this asset that you are talking about is, in fact, a forfeitable asset; it did, in fact, come from criminal activity. So that is the first triggering device, and absent that——

Senator SPECTER. Well, how do you prove that? Where do you prove that in this proceeding?

Mr. TROTT. It can be proved in any number of ways. In the trial itself, you prove it as part of the trial; you trace the asset.

Senator SPECTER. Yes; but you are taking the assets in advance of trial.

Mr. TROTT. Well, that is right. We are seizing the assets in advance of trial.

Senator SPECTER. Before it is proved.

Mr. TROTT. That is right, the same way we seize a body before a trial before anything is proved with respect to the guilt of the person, also.

Senator SPECTER. What body?

Mr. TROTT. Of the individual. A person arrested is also seized before he or she is proved guilty, too.

Senator SPECTER. Yes; but on a showing of probable cause, with a judicial determination. That is not made on the determination of the Government. That is made on a showing of probable cause and a warrant is issued by a judicial authority.

Mr. TROTT. Well, I think in order to actually seize the assets, you have to either proceed by way of a civil hearing under 881, which would be an in rem proceeding which would be outside of the CCE or the RICO proceeding.

Senator SPECTER. Well, do you do that?

Mr. TROTT. That is an option that has been done, but I think in the CCE or the RICO context it is more likely that these assets would be identified in the charging documents, and then a restraining order would have to be secured from a court based on a showing that would be predicated on the factual scenario that you were dealing with.

Again, there are many protections that attach before something like this is done and before assets are taken outside the reach of a particular individual. But once again let me keep repeating that we would have to show that these assets came from the criminal activity proscribed by the statutes That is the trigger beyond which we must go before we can take any other action.

Senator SPECTER. Well, I am going to yield at this time to Senator Metzenbaum, but with the concluding concern about these issues. I have not thought of BFP's for a long time. BFP's, for those who do not know what they are—do you know what they are?

Senator METZENBAUM. I have not the slightest idea.

Senator SPECTER. That is a bona fide purchaser for value, which arises in a very different context than this issue.

Senator METZENBAUM. I thought it was a criminal kind of thing, but it is really not that?

Senator SPECTER. No; it is a totally different concept in another sequence.

Mr. TROTT. Rightly or wrongly, I think of this in terms of an analogy to other fruit of crime. As I mentioned before, if a car thief tries to pay a lawyer with the stolen cars, who belongs to the stolen cars, the lawyer or the victim who owned the cars in the first place?

I think clearly a car thief cannot use stolen cars to pay the lawyer. We would not sit still for that.

Senator SPECTER. Mr. Trott, that is the rabbit in the hat. The issue is how do you know it is a stolen car. If that is determined in the course of the trial, then you know it.

If you have to have a pre-trial determination which gets involved with what the attorney knows or has learned from his client, it seems to me you are in a very tender area.

Mr. TROTT. But I think here is the analogy and here is what we are trying to avoid: A special exemption or exception for lawyers that does not apply to anybody else. If a white-collar swindler manages to relieve a series of families of their life savings and then uses that money to pay the lawyer, who gets the life savings, the lawyer or the victims?

What about a ransom in a kidnapping situation? Who gets the ranson money, the lawyer or the family whose child was kidnapped? As far as we can see, there is absolutely no difference with racketeering money or drug money.

Some racketeering charges involve extortion. If you are the victim of an extortion and the extortion has dredged money out of you and been handed over to the extortionist's lawyer to pay, who should get that money? We do not think it should be the lawyer, especially if the lawyer takes that money from the extortionist knowing full well that that is the very extortion money itself, or the ransom money or the drug trafficking money et cetera.

So I think when you proceed from that assumption that we do not want successful criminals to profit from crime either by using that money to buy cars or property or businesses, then we recognize, I think, that just as with an insolvent defendant who is placed on a different footing in terms of the sixth amendment, we deal with drug traffickers and RICO people the same way.

Senator SPECTER. Well, with the pending question of who should get the money, we will turn to Senator Metzenbaum to answer that question.

Senator METZENBAUM. Well, Mr. Chairman, as you know, we are all concerned—at least I am, and I think others as well—- about going to the Shcharansky meeting at 11 in the Rotunda, and I do not think this hearing will be concluded, unless you intend to proceed.

Mr. Trott, I do have a couple of questions before I leave, and if I leave, it is not because of a lack of interest, but just because I want to be over at the Scharansky—not a hearing, but a meeting in the Rotunda.

What concerns me about your position has to do with the loss of the opportunity to have legal representation by an individual who is presumed innocent until proven guilty. As I understand it, you are saying that there is forfeiture only if the attorney knowingly took the money knowing that it was forfeitable.

That puts the attorney in the position of having to make a judgment call. Is it going to be forfeitable or not? It is only forfeitable if the client is guilty. Now, let us assume that the individual admits the facts, but by reason of any one of a host of issues—whether it is privilege against self-incrimination, he may be able to be found not guilty; whether it has to do with the statute of limitations, whether it has to do with a host of other technical issues. Maybe it is in the wrong venue, or whatever.

The attorney says, "I think that I can get you off and I think I can prevail." Now, what you are saying is that he has to at that point make a judgment decision if it is forfeitable, if he is con-

vinced that he can win it and that the U.S. attorney does not have any other witnesses except him.

What bothers me is this right that we have recognized ever since this country was formed and created that an individual is presumed innocent until proven guilty—and if you deny him or her the right to have counsel, I do not understand how you can do that.

Mr. TROTT. Senator, the point is—let me walk through something. If we were to have a proceeding such as the one we are talking about before trial—a proceeding such as the one Senator Specter describes, or a decision by a lawyer such as you are talking about not to represent somebody—in other words, you make a business decision. Hey, they are telling me all this is drug money or extortion money, or whatever. It looks like I am not going to get paid; sorry, I will not represent you.

That person is not going to be unrepresented; that is the point. The person will be represented.

Senator METZENBAUM. By whom?

Mr. TROTT. By a court-appointed lawyer, by the Federal public defender, or the same person who would represent anybody who showed up in court and said I do not have money.

Senator METZENBAUM. Just a moment. Let us put ourselves in this position. He comes in with diamond rings and he has got the finest clothes on, and everybody knows that he has a magnificent home and he drove up in his Rolls Royce. And he walks into the courtroom and he says, would you appoint a lawyer to represent me; I cannot get anyone to represent me, because he is afraid that he might have to forfeit the money, although he tells me he thinks he can win the case.

Do you really think that is realistic?

Mr. TROTT. Yes; I think it is very realistic, not that the person is going to say that, but the situation is going to occur when you have somebody who has only made money from criminal activity, and we are going to forfeit every penny, including the diamond rings, the houses, the automobiles.

Senator METZENBAUM. And you think he is going to get a pro bono lawyer to represent him?

Mr. TROTT. Sure. The court will appoint a lawyer. It happens every day in this country when criminals go into Federal court without any money and judges appoint lawyers for them.

Senator METZENBAUM. Wait a minute, wait a minute. I just told you he has got loads of money. He has got $10 million in the bank, he has got a Rolls Royce, he has got his home.

Mr. TROTT. It is not his.

Senator METZENBAUM. Wait a minute. You just made that conclusion. You arrived at the ultimate evidenciary conclusion that it is not his—the legal conclusion.

I am saying to you at this moment, is the Justice Department saying to this very, very wealthy man, you have to get a lawyer appointed by the court because no lawyer will represent you because it is possible that you will have to forfeit all of your assets?

You are kidding yourself and you are kidding us to think that that person could have a pro bono lawyer appointed.

Mr. TROTT. Senator, if we have this person charged with a RICO offense, extortion, or a continuing criminal enterprise with being a

major drug dealer, and we have identified in the indictment all the assets that you just referred to as having been received directly from the criminal activity involved, and we are preparing to go in and ask for a restraining order and all the rest, there are certain circumstances, probably very frequent circumstances, under which that man will not have legal money enough to hire a lawyer to represent him, in which case a lawyer will be appointed by the court to handle the representation.

Senator METZENBAUM. Mr. Trott, I cannot believe you. You are even recommending, my staff points out, budget cuts in order to cut back on the public defenders.

I cannot believe what you are saying, but let me pass on because I am not going to change your opinion. Maybe you were sent here to say what you are saying, but I just cannot——

Mr. TROTT. No, Senator. I want you to know right now that I believe personally in everything I say because it proceeds from one assumption, and that is that drug traffickers and racketeers must be stripped of their profits.

Senator METZENBAUM. This sounds like the Attorney General speaking, who presumes that people are guilty until they are found innocent, but let us go on for 1 minute.

Would you be willing to have the court make a determination and make an allocation of some portion of the defendant's assets in order to pay counsel?

Mr. TROTT. No.

Senator METZENBAUM. Thank you.

Senator SPECTER. Senator Simon.

Senator SIMON. Yes, just a couple of general comments. The most fundamental job we have as Senators and the most fundamental job you have in the Justice Department Mr. Trott, is to protect the basic freedoms of this country, and I think history proves that it is much easier to give those away than to retain them.

Part of that basic protection is to make sure that people are not abused; that they have the right to counsel. I was just reading one of the American Bar Association's resolutions, which seems to make eminent good sense.

It says,

> Be it resolved that the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 and subpoenas issued pursuant thereto directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect the illegal activity of a client.

If you can prove than an attorney is using his position or the bar as a way of covering up his profits or activities, then go at it; you had the right before this came about.

But it just seems to me that we ought to be very, very careful about denying people the chance to retain counsel, and adequate counsel. And when we protect the rights of the drug dealers—there is no one here who wants to protect drug dealers, but when we protect their right to counsel, we are protecting the right to counsel for all of us.

I think those are the fundamental rights that somehow get lost as I listen to your presentation.

Mr. TROTT. Senator, I have no disagreement with almost everything you say. The only difference is that once the forfeiture procedure plays itself out, you are not talking about somebody who is standing before a court unrepresented by a lawyer. The sixth amendment right remains.

The question is how can we do this without creating a special exception for lawyers that would permit lawyers to knowingly and willingly and with their eyes wide open accept the proceeds of criminal activity.

Essentially, what we are saying is, if I were a defense lawyer arguing this proposition, what we are saying is that I can walk into a criminal case, see hundreds of thousands of dollars on a table from extortion or drug trafficking, and say, fine; that is mine for my fee; I do not have any problem taking that at all.

We are saying that that person as a lawyer should be allowed to have that, but nobody else. The drug trafficker or the racketeer can use it for nothing else, but he can pay the lawyer. I find that obnoxious as a matter of principle.

Senator SIMON. Do you not think that when someone——

Senator SPECTER. Senator Simon, are you close to being finished, because we are going to have to put the hearing in recess for the Shcharansky affair.

Senator SIMON. I do not want to delay the reception, but I would like to express my views. My concern with your position is I that lawyers may think twice before they represent Joe Smith or Jane Jones, because they may have a fee taken away from me. That is the problem.

Mr. TROTT. Senator, they think that every day when they make a business decision whether to represent somebody or not based on the economics of it.

Senator SIMON. Well, economics is one thing. Justice Department regulations stating that you are going to take that fee away from them are another matter.

Mr. TROTT. Only when it can be shown that this is forfeitable because the fee itself came from criminal activity. It is like the swindle on a white collar case or the stolen property that is taken in another case.

Senator SIMON. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Simon.

Thank you, Mr. Trott. Senator Thurmond has asked that the hearing be recessed because the Shcharansky proceeding is about to begin in the Rotunda. The Senate is now in recess. There has been a request from Senator Biden for you to stay, Mr. Trott, because he is going to have some questions for you.

So I regret the recess, but the Shcharansky matter was scheduled after this hearing had commenced, and that is what the chairman has decided. So we will resume the hearing after the Shcharansky matter is concluded.

Mr. TROTT. Do you have a sense how long that might be, Senator?

Senator SPECTER. Well, my sense, Mr. Trott, is not a whole lot better than yours, but my judgment is somewhere around 11:30, 11:45.

Mr. TROTT. Thank you.

Senator SPECTER. We have not had one of these before. It is not as long as an appeal.

[The prepared statement follows:]

PREPARED STATEMENT OF STEPHEN S. TROTT

I am pleased to appear before the Committee to testify concerning the application of the RICO and CCE forfeiture provisions to attorneys' fees. The emerging debate on this topic has become mired by the lack of a clear understanding of exactly what is at issue. This hearing should shed considerable light on the issue, and we appreciate the opportunity to present our views concerning a very simply stated question: Should attorneys be allowed to accept money or property from a RICO or CCE defendant when they know that the money is the proceeds or instrumentalities of that crime?

I would like to address my remarks to clarifying how this issue has arisen as a result of the Comprehensive Crime Control Act of 1984; what the courts have said concerning the matter; why we believe it is inappropriate to exempt attorney's fees from forfeiture; and why such an exemption is not required by the Constitution. Finally, I would like to explain the Department's policy concerning the forfeiture of attorney's fees and how that policy has been implemented to date.

1. The Effect of the 1984 Amendments to the RICO and CCE Forfeiture Statutes.

When the statutes providing for the forfeiture of assets as a penalty for violations of the RICO and CCE statutes (18 U.S.C. 1963 and 21 U.S.C. 848) originally were enacted, it was unclear whether the so-called "relation-back" doctrine would apply to forfeitures under those statutes. This doctrine had developed principally with respect to civil *in rem* forfeitures. It provides that once the government proves that particular property is forfeitable, the government's title to it "relates back" to the commission of the act giving rise to the forfeiture. In practical terms this means that if a wrongdoer acquires an

ill-gotten asset by committing a CCE or RICO offense and thereafter transfers it to a third party, the government is entitled to take the property from the third party. The theory is that since the government's title "relates back" to the time of the commission of the offense, the wrongdoer had no title which he could convey to the third party. It is recognized that this result can be very unfair to an innocent third party. Therefore, the civil forfeiture statutes allow an innocent third party to defeat the government's claim.

The Comprehensive Crime Control Act of 1984 revised the criminal forfeiture penalties of the CCE and RICO statutes to implement the relation back doctrine with respect to forfeitures under those statutes. See 18 U.S.C. 1963(c), 21 U.S.C. 853(c). The amendments effectively overruled those cases which had held that criminal forfeitures did not relate back. See, e.g., United States v. Alexander, 741 F.2d 962 (7th Cir. 1984); United States v. McManigal, 708 F.2d 276, reaffirmed in pertinent part 723 F.2d 580 (7th Cir. 1983). The need to apply the relation back doctrine to criminal forfeitures was amply demonstrated at the time the amendments were enacted. As explained in the Senate Report: "Absent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction." S. Rep. No. 98-225, 98th Cong. 1st Sess. at 200.

As I noted, the impact of the relation back doctrine upon third parties admittedly can be very harsh. Therefore, as an equitable measure, the criminal forfeiture statutes were also amended to allow a third party to set aside a forfeiture of assets transferred to him. The equitable relief provisions are the same as those provided in civil forfeiture statutes. In order to set aside a criminal forfeiture, the statutes require a third party to prove both that he was a bona fide purchaser and

that he was reasonably without cause to believe that the property was subject to forfeiture when he received it. See 18 U.S.C. 1963(c); 21 U.S.C. 853(c).

The ability of government to forfeit assets transferred to an attorney by a CCE or RICO defendant was substantially increased by these amendments because they provide the government with authority to forfeit assets transferred prior to conviction. Prior to the amendments, fees paid prior to conviction generally were immune from forfeiture. Now, if the government proves that an attorney's fee in fact was paid with the instrumentality or proceeds of the offense, the attorney is entitled to keep the fee only if he can prove that he was both a bona fide purchaser and did not have reason to know that the assets were tainted.

2. The Courts' Interpretation of the 1984 Amendments As Applied To Attorneys' Fees.

Since the amendment of the CCE and RICO forfeiture statutes, a number of attorneys representing CCE and RICO defendants against whom forfeiture counts have been charged have filed motions asking the district courts to rule that any assets they receive for representing the defendants are exempt from forfeiture. In at least two cases the district courts granted such motions and held that any property or money paid to an attorney by a RICO or CCE defendant is forfeitable only if the transaction is a sham or fraudulent transaction. See United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); United States v. Ianniello, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985). In effect, these courts have held that even if an attorney knows that he is receiving the proceeds of a drug or racketeering offense, he nonetheless is entitled to keep those proceeds if they were paid to him as "legitimate" attorney's fees.

3. The Inappropriateness of Exempting Attorney Fees.

Before addressing the rationale of these decisions, which we believe is fundamentally flawed, it is important to emphasize the reasons why, from moral and practical standpoints, attorneys should not be exempted from meeting both requirements under the forfeiture statutes for equitable relief; i.e., that at the time they received forfeitable assets they were bona fide purchasers and reasonably without cause to know the assets were subject to forfeiture.

The only assets which can be forfeited are those which in fact are the instrumentalities or proceeds of a drug or racketeering offense. Thus, to the extent a person who receives such assets from a wrongdoer is allowed to keep them, he is being allowed to enrich himself, at least indirectly, as a result of those criminal activities. We agree that it is fair and equitable to allow someone who parts with value and who does not know that he is receiving drug or racketeering property in return to keep that property. However, Congress, the American people and we all agree that drug and racketeering activity is an insidious cancer that threatens the very fabric of our society. It thrives on the profits which it generates at tremendous costs to our national well-being. Thus, it is patently offensive to allow people who deal with drug dealers and racketeers to enrich themselves with drug and racketeering money, knowing that the money is derived from drug and racketeering activity. The fact that the recipient of these monies is an attorney does not change this conclusion.

The idea that an attorney can knowingly accept and keep drug proceeds also affronts our basic concept of what is right and just. This is best understood by way of analogy. Suppose a defendant is accused of stealing a car, and he uses that car to pay an attorney to defend him on those charges. Would it be

right for the attorney to be allowed to keep that car if the defendant was convicted and the jury found that the car the attorney received was the very car the defendant stole? No. It would run contrary to the accepted belief that the innocent victim -- the car owner -- has the superior claim to the car. This is especially true if the attorney knew when he accepted the car as payment for his fee that the car was the same car his client was accused of stealing.

The situation is no different with respect to RICO and CCE activity. For example, the predicate activity for a RICO charge may be extortion. As between the victim who unwillingly gives his property to a RICO defendant because of a threat of serious bodily injury and an attorney who receives that money from the RICO defendant knowing that it is the extortion money, who has the greater claim? The answer is obvious. The only difference between the situation involving the car thief and that involving the racketeer is that in the latter situation the recovered money goes to the government rather than the particular victim. However, this is appropriate since society at large in a very real sense is the victim of drug and racketeering activity.

From a practical standpoint, exempting attorneys' fees undermines substantially the effect of the forfeiture penalties as economic disincentives to drug and racketeering activity. It may not be possible to satisfy a forfeiture judgment from a defendant's legitimate assets if he has dissipated the illicit assets. Consequently, if attorneys' fees are exempt from forfeiture, a defendant would have every incentive to pay his attorney with the illicit assets and retain only his legitimate assets. The result would be that the government would be unable to satisfy the forfeiture judgment and, at the same time, the defendant would realize the full economic benefit of his misconduct by bartering the ill-gotten proceeds for legal

services. This certainly "would undermine the purpose of the forfeiture statutes, which is to strip offenders and organizations of their economic power." In re Grand Jury Subpoena Duces Tecum (Simel), 605 F.Supp. 837, 849-50 n.4. (S.D.N.Y.), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985).

The potential for abuse only exacerbates the extent to which an exemption for attorneys' fees would undermine the purposes of forfeiture. It would not be difficult for a defendant to act in concert with his attorney to inflate the fees, pay them with ill-gotten assets, and thus protect a substantial amount of assets from forfeiture which could later be routed back to the defendant. While no one has argued that such a transaction should be exempt if in fact it is fraudulent, such a fact may not be capable of easy proof. The requirement that an attorney prove that he was reasonably without cause to know the asset was subject to forfeiture provides a substantial additional protection against such collusive action.

4. The Constitutional Issues.

Because there are very substantial reasons for not exempting attorneys' fees, we believe that they should not be exempt unless there is some compelling reason to do so. It has been argued that the Sixth Amendment guarantee of the right to counsel is just such a reason and indeed requires that fees be exempt from forfeiture. We do not believe that this argument can withstand scrutiny.

Forfeiture of attorneys' fees potentially implicates two guarantees under the Sixth Amendment. First, a defendant has the right to counsel in any criminal prosecution which might result in imprisonment. Scott v. Illinois, 440 U.S. 376, 373 (1979). This right is absolute and cannot be abridged in any fashion.

Second, a defendant who is financially capable is entitled to retain counsel of choice. However, this right to counsel of choice is qualified and is not absolute. It may be restricted when there is a significant countervailing public interest. See, e.g., United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 485 (1979).

A defendant's right to counsel of choice is not violated by the application of the forfeiture provisions to attorneys' fees, and therefore it neither justifies nor requires that there be an exemption from forfeiture for attorneys' fees. First of all, this right to counsel of choice is qualified, and one of the chief limitations is economic. A defendant is entitled to counsel of choice only if he has the funds to pay counsel. See United States v. Rogers, 471 F.Supp. 847, 851 (E.D.N.Y.) ("Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney.") A corollary of this is that a defendant does not have a right to government funds to pay for chosen counsel. Yet, that it is precisely what is being pressed as a rule of constitutional law when it is argued that forfeitable assets paid to an attorney must be exempt from forfeiture. The fact is that a defendant is divested of any title he may have to forfeitable assets when he is convicted and title passes to the government. Moreover, in the case of forfeitable proceeds generated by the crime itself (e.g., the proceeds of loan-sharking, bribery and drug trafficking), the relation back doctrine means that a defendant is not just divested of his interest, but that he never acquires any interest in such property. Unquestionably, to argue that the right to counsel of choice guarantees the right to use these governmental funds to pay counsel is extreme and unwarranted.

It is true that prior to conviction it has not been proven that a defendant's assets are ill-gotten. It is argued that in view of this, a defendant prior to conviction has a right to use any funds, even those alleged to be forfeitable, to hire counsel. However, as noted above, several courts have held that a pre-conviction restraint of funds alleged to be forfeitable is proper, even in the face of a claim that they are needed to pay counsel. The rationale underlying these decisions is that the government has a significant and compelling interest in preserving assets that have been shown by a probable cause standard to be forfeitable, and that this interest justifies the restriction upon the qualified right to counsel of choice that results from the restraining order.

In the absence of a restraining order, the restrictions placed upon a defendant's use of assets to pay an attorney are less restrictive. Nothing prohibits the defendant from using any legitimate assets to hire counsel. And with respect to illegitimate funds, all that is done is to warn an attorney that if he takes such assets they may be taken away after conviction if the attorney had reason to know that the funds were illicit.

It is true that this warning may cause some lawyers to decline to represent a CCE or RICO defendant. But this does not result from any unfounded government action since the fee cannot be forfeited absent proof that it is in fact from tainted funds. Rather, it stems from the natural caution that anyone might exercise in deciding not to deal with a defendant facing a CCE or RICO charge unless there are reasonable assurances that any money received is from a legitimate source. Thus, the only restriction upon a defendant's use of funds prior to conviction to hire counsel is that the defendant must assure his attorney, to the attorney's satisfaction, that the fee comes from a safe source. This minimal restriction on the right to counsel of choice is

justified by the government's significant and substantial interest in eradicating the profits that fuel the engine of racketeering and drug activity.

5. Application of the Forfeiture Statutes to Attorneys' Fees.

We think it is important to point out that while the Rogers and Ianniello decisions examined the constitutional issues, neither of them actually exempted attorneys' fees on constitutional grounds. Rather, they held that the statutes were not intended to apply to legitimate attorneys' fees. The constitutional analysis was secondary and was used to bolster the conclusion that the statutes were not intended to apply to attorneys' fees. The courts reasoned that any ambiguity in the statutes had to be resolved in favor of exempting attorney's fees in order to avoid the constitutional problems. As just discussed, the constitutional analysis of these decisions was not correct. We also believe that the conclusion that the forfeiture statutes were not intended to apply to legitimate attorneys' fees is also in error.

The conclusion that attorneys' fee are subject to forfeiture only if they are part of a sham or fraudulent transaction is just not indicated anywhere in the statute. The language of the statutes clearly does not provide any exemption for attorneys' fees. An attorney, like anyone else, is entitled to relief only if he was reasonably without cause to know the assets he received were subject to forfeiture. Additionally, a conclusion that only sham transactions are subject to forfeiture runs contrary to the principle that all parts of a statute must be given effect. If the forfeiture statutes apply only to bogus transactions, the "reasonably without cause" requirement is effectively written out of the statute. Once a third party demonstrates that he was a bona fide purchaser in the sense that he gave value for the

assets he received, he would have proven the transaction was not a sham and therefore is exempt from forfeiture. This gives absolutely no effect to the specific requirement that the third party demonstrate he did not have reason to know that the asset was tainted.

We believe the intent of the statutes, as evidenced by their plain language, is that forfeiture should apply to legitimate or bona fide transactions if the third party knows or had reason to know that he is obtaining drug or racketeering money. The scope of forfeiture provisions must be this broad in order to fulfil their purpose of insuring that drug dealers and racketeers simply do not profit from their wrongdoing.

6. The Department of Justice Guidelines.

There have been allegations that the ability to forfeit attorneys' fees provides a vindictive prosecutor with a tool by which he can force an aggressive attorney from a particular case, simply by alleging that he will seek forfeiture of the attorney's fee. This amounts to nothing more than a scarce tactic and does not provide any basis for the drastic proposal that attorneys' fees be exempted from forfeiture. First of all, there has been no proof that the Department has engaged in such practices, and these allegations are groundless. As discussed later, the number of cases in which the Department has taken any action to forfeit fees are few indeed.

But perhaps more important is the fact that we recognize the potential for such abuse, and we have implemented guidelines that insure our prosecutorial discretion is exercised prudently. One of the stated purposes of the guidelines is to insure that forfeiture "is pursued fairly and with due consideration for the individual's right to counsel in a criminal matter." United

States Attorneys' Manual, §9-111.400. Accordingly, the guidelines allow forfeiture of fees paid for representation in a criminal matter only where there are reasonable grounds based on specific evidence to believe that the attorney had actual knowledge that the asset he received was subject to forfeiture. This is a knowledge standard higher than that provided in the forfeiture statutes. Additionally, no action to forfeit a fee can be taken without the approval of the Assistant Attorney General, Criminal Division. Thus, no prosecutor is at liberty to threaten forfeiture simply to remove an attorney from a case.

These protections are substantial because we have also placed limitations upon the types of evidence that we will consider in deciding whether there are reasonable grounds to believe an attorney knew he was receiving tainted assets. First, we will not send a letter to an attorney notifying him that we believe a defendant has no legitimate assets, even though that may be the case, simply for the purpose of later proving that the attorney knew the assets he received were tainted. Second, we will not rely upon any compelled disclosures of confidential communications made during the representation in order to meet the actual knowledge requirement. In this regard, our guidelines also alleviate the likelihood that an attorney will face any dilemma between maintaining confidences and protecting his fee. Practically speaking, if we can meet the requirement that there be evidence that the attorney actually knew the asset was subject to forfeiture, there is not likely to be any information which an attorney will have obtained in confidence that will establish he was without reason to know the asset was forfeitable.

Finally, we have adopted policies designed to minimize the situations in which we will have any interest in forfeiting assets paid to an attorney. Our guidelines allow us to enter into an agreement with an attorney to exempt the fee if the

attorney can demonstrate that the fee is being paid from a legitimate source. The guidelines specifically direct that "[e]fforts should be made to assist in identifying the assets, if any, belonging to a defendant which are not subject to forfeiture." United States Attorneys' Manual §9-111.700. Additionally, if a defendant voluntarily restrains sufficient property to satisfy the forfeiture judgment, we would not seek to forfeit the fee. Id. §9-111.210.

7. Forfeiture Authorizations to Date.

We believe that our guidelines protect against abusive use of the forfeiture provisions. That they do so and that there have been no abuses is borne out by examining the cases in which we have authorized forfeiture.

Since the date of the policy requiring the prior approval of the Assistant Attorney General, authorization has been granted in a total of six cases. Only one case involves assets which have actually been transferred to an attorney. In this case, authorization was granted to seek forfeiture of a fee already paid to an attorney for representing the client in a current criminal case. The attorney was informed that steps might be taken to forfeit the fee in the event the client is convicted and a forfeiture judgment is obtained; however, no proceedings as yet have been instituted to forfeit the fee nor has the fee been included in the forfeiture count of the pending indictment. The district court in which the criminal charges are pending granted a motion by the attorney to exclude from forfeiture any assets transferred to him by the client for representation in the current matter. We are appealing that decision prior to trial. Consequently, the attorney will know before trial if his fee is in jeopardy.

In the five remaining cases in which authorization has been granted, none of the assets have actually been transferred to the attorneys. Instead, the clients merely assigned their interests in the assets which are the subject of the forfeiture proceedings. The attorneys have filed third-party claims and the United States Attorneys have been authorized to contest the claims of the attorneys.

Four of these cases involve civil forfeiture proceedings that were instituted to forfeit currency that was seized by state or local authorities as evidence or proceeds of a crime. The currencies that are the subjects of these proceedings were assigned to the attorneys for representation to be rendered on state or local criminal charges after the currency had been seized. In none of these cases had the currency actually been paid to the attorney, but it remained in the possession of the law enforcement agencies.

The fifth case involves a criminal forfeiture. In this case, two defendants were convicted on RICO charges, and an order of forfeiture was entered forfeiting certain property which had been alleged to be subject to forfeiture in the indictment. Thereafter, the attorneys for the defendants filed a third-party claim, alleging that a lien securing payment of the attorneys' fees for representation in the matter had been executed by the defendants on the forfeited property. Authorization was granted to contest the attorneys' claim to the property since the lien was executed after return of the indictment containing a forfeiture count particularly describing the property upon which the lien was executed.

In summary, we believe that attacking criminal profits is one of the most effective ways to combat major criminal activity such as drug trafficking and racketeering. The forfeiture

statutes that exist provide us with very effective tools to accomplish this goal, and we are attempting to implement them as effectively as possible. Any change in their scope, we believe, would be unwise and would substantially erode their effectiveness.

We recognize that assuring every criminal defendant of representation by counsel is a cornerstone of our system of jurisprudence. But we do not believe that this very basic right is threatened by the application of the forfeiture statutes to attorneys' fees, since the only fees in jeopardy are those that are paid from drug and racketeering money and that the attorney knows are paid from such sources. Thus, to conclude that the Constitution requires an exemption for attorneys' fees is to conclude that a criminal wrongdoer who obtains money by victimizing society is guaranteed the right to use that money to defend against criminal charges. We believe that this proposition distorts and denigrates the noble nature of the right to counsel protected by the Constitution.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

07 JUL 1986

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Thurmond:

This responds to your letter to Attorney General Meese of May 13, 1986, asking several questions concerning the forfeiture of attorneys' fees.

Question 1: What factors enter into a decision to seek attorney fees forfeiture in a particular case? Do you have guidelines promulgated? What have your practices been in this area?

The decision to seek forfeiture of assets transferred to an attorney for legal services is a three step process.

The first step is to consider whether we can meet the evidentiary burden imposed upon us. In a criminal case, we must be able to prove beyond a reasonable doubt that the money and property which the attorney received are the proceeds or instrumentalities of a crime. In a civil forfeiture proceeding, we must be able to prove by a preponderance of evidence that the money or property is subject to forfeiture. If we conclude that the initial evidentiary burden can be met, we must then determine if the attorney would be entitled to equitable relief. This entails a review of the evidence that is available to rebut a showing by the attorney that he or she was a bona fide purchaser and without reason to know that the money or property received was subject to forfeiture. See 18 U.S.C. §1963(m)(6); 21 U.S.C. §853(n)(6). If there is insufficient evidence to overcome such a showing, we must forego forfeiture of the fee even if it was paid from illegitimate property or funds.

The second step involves consideration of the guidelines which we promulgated on September 18, 1985. (A copy of our guidelines is enclosed for your convenience.) Assuming that it can be proven that a fee was paid from forfeitable assets, our guidelines require that we be able to do more than simply rebut a showing by the attorney that he or she was without reasonable cause to believe the assets were subject to forfeiture. If the fee was legitimately paid for representation in a criminal matter, forfeiture will not be pursued unless there are reasonable grounds to believe that the attorney actually knew that the money or property was subject to forfeiture when it was received. See §9-111.430. This requirement is met where there is evidence either that the attorney actually knew the particular money or property had been alleged to be subject to forfeiture or that the attorney in fact knew the money or property came from criminal misconduct. (See §9-111.510.) While the guidelines provide examples of facts that may establish the requisite knowledge, a final decision on this issue must be made by the Assistant Attorney General in charge of the Criminal Division on a case-by-case basis. (See §9-111.511 and §111.512.) The Assistant Attorney General may not, however, consider certain

types of evidence in making this decision. Neither a letter to an attorney stating that the government believes the client has no legitimate assets nor any compelled disclosures of communications between the attorney and the client may be relied upon to prove that the attorney knew the fee was paid with forfeitable assets.

The third step requires an assessment of whether we need to or should seek forfeiture of the fee. The guidelines do not specifically address this issue, but they do indicate some of the factors that are considered in making this decision. Perhaps the most critical factor is whether the defendant has sufficient assets still in his or her possession that can be use to satisfy fully the forfeiture judgment. In this regard, where courts have not required tracing of generic assets, such as cash, there may no need to forfeit any assets previously transferred to an attorney or any other third party. A legislative enactment specifically allowing forfeiture of substitute assets would undoubtedly further limit the need to seek third party forfeitures. Another relevant consideration is the amount of the fee in relation to the total amount of assets which are subject to forfeiture. Where the fee represents only a small portion of all the available forfeitable assets, we most likely would not seek forfeiture. Finally, we take into account whether the money or property actually has been transferred to the attorney or whether there is simply an assignment of money or property in the government's custody. Most cases in which the Assistant Attorney General has authorized fee forfeiture involve an assignment to an attorney of a defendant's interest in property after the government had seized that property and after the defendant was charged with a criminal offense.

We emphasize that each of these three steps are examined at several levels. In the first instance, the prosecutor actually handling the case must decide if the evidentiary burdens can be met. If the answer is yes, the prosecutor must decide if the requirements of the guidelines can be met and, if so, whether it is wise or necessary to seek forfeiture. Assuming the prosecutor believes forfeiture is proper, these issues are reviewed by the United States Attorney. If the United States Attorney concurs with the prosecutor, a request is then made to the Assistant Attorney General for authorization to seek forfeiture. When the Assistant Attorney General reviews a request for authorization all three of these issues are once again examined.

With regard to our practices thus far, authorization to forfeit a fee has been granted in a total of only six cases since the time we began requiring the prior approval of the Assistant Attorney General. Some of these authorizations concern forfeiture proceedings that were initiated prior to time that the approval of the Assistant Attorney General was required. The United States Attorneys, however, obtained approval to continue contesting claims by attorneys that they were entitled to the assets that were the subjects of the proceedings.

Only one case involves assets which were actually transferred to an attorney. In this case, authorization has been granted to forfeit a fee paid for representation in a current criminal case. Our investigation revealed that the necessary factual predicates both under the statute and under our guidelines had been met. The attorney has been informed that steps may be taken to forfeit the fee in the event the client is convicted and a forfeiture judgement is obtained; however, no proceedings as yet have been instituted to encumber or forfeit the fee nor has it been included in the forfeiture count of the pending indictment. The district court in which the criminal charges are pending has granted a motion by the attorney to exclude from forfeiture any assets transferred to him by the client for representation in the criminal case. We are appealing the decision of the district court.

In the five remaining cases in which authorization has been granted to seek forfeiture of a fee, the assets have not actually been transferred to the attorneys. Instead, as noted above, the clients merely assigned their interests in assets which are the subjects of the forfeiture proceedings and the attorneys have filed third-party claims. The United States Attorneys have been authorized to contest the claims of the attorneys to these assets.

Four of these cases involve civil forfeiture proceedings instituted to forfeit currency seized by state or local authorities. The currencies that are the subjects of these proceedings were assigned to the attorneys for representation in state or local criminal proceedings after the currency had been seized. Federal forfeiture proceedings were instituted because of the unavailability of forfeiture in the state courts. In none of these cases has the currency actually been paid to the attorney, but at all times it has remained in the possession of a law enforcement agency.

The fifth case involves a criminal forfeiture. In this case two defendants were convicted on RICO charges, and an order of forfeiture was entered concerning property identified in a forfeiture count of the indictment. Thereafter, the attorneys for the defendants filed third-party claims, alleging that a lien securing payment of their fees in the matter had been executed by the defendants on the forfeited property. Authorization was granted to contest the attorneys' claim to the property since the lien was executed after return of the indictment containing a forfeiture count particularly describing the property upon which the lien was executed.

One additional case should be noted that does not actually involve forfeiture of a fee. This case involves a claim by a defendant's attorneys to be paid from assets that had never been transferred or assigned to them and that have been ordered forfeited. The attorneys filed a motion seeking payment of their fees from the forfeited assets after the defendant was convicted pursuant to plea and after an order of forfeiture was entered. The court granted the motion over the government's objections. The Department is appealing the district court's decision.

Question 2: How will forfeiture help to strip racketeers and drug dealers of the "economic power bases" generated by their criminal activities?

Although the question asked broadly how forfeiture helps to strip offenders of the economic power bases of their criminal activities, we assume it refers to third-party forfeiture and specifically to fee forfeiture.

The economic power bases of racketeers and drug dealers are of value only to the extent they can be used either to establish and finance criminal enterprises or to acquire necessary goods or services or to support an extravagant lifestyle. Therefore, any mechanism which removes the ability of a racketeer or drug dealer to barter ill-gotten gain for goods or services will strip them of the real benefits of their economic power. Third-party forfeiture is such a mechanism, and to a large degree works in a prophylactic manner. It warns those who deal with racketeers or drug dealer and knowingly accept drug or racketeering money that they act at their peril and may have that money taken away. This certainly hampers the ability of drug dealers and racketeers to use the fruits of their criminal activity to purchase anything for their own enjoyment or benefit, whether it is a trip to Europe or the services of an attorney, and thus neutralizes the advantages of receiving tainted funds.

Forfeiture of attorney's fees has another more specific impact upon the economic power of racketeers. A significant benefit of the tremendous economic resources of racketeers and drug dealers is the ability to provide legal representation for those working for the criminal enterprise in the event these "workers" are charged with criminal misconduct. It is not unusual for the legal representation to be provided not for the benefit of these individuals but to keep the organization intact by discouraging them from accepting any plea which would require them to cooperate with the government and provide testimony against the organizers of the racketeering or drug enterprise. Forfeiture of attorneys' fees paid with illegitimate funds removes the ability of the racketeers and drug dealers to use the fruits of their misconduct to insulate themselves from prosecution in this manner.

Question 3: Why effective has issuing subpoenas for defense attorneys to appear before grand juries been in

> gathering evidence in forfeiture proceedings? What questions can a defense attorney be asked before a grand jury that do not violate the attorney-client privilege?

As of July 18, 1985, the Department of Justice adopted a policy requiring that all subpoenas to attorneys for information relating to a client be approved by the Assistant Attorney General of the Criminal Division. We have been able to compile substantial data concerning the issuance of subpoenas from that date through and including February 28, 1986. An analysis of this information was provided to Senator Leahy in response to a number of questions he raised concerning attorney subpoenas and fee forfeiture. A copy of my letter to him dated April 18, 1986 is enclosed.

With regard to your specific question, few of the 169 grand jury subpoenas issued between July 28, 1985 and February 28, 1986, were issued for purposes of simply discovering forfeitable assets. Moreover, none were issued to discover if forfeitable assets were held by an attorney or in order to provide a basis for fee forfeiture. In fact, according to our records, only fourteen grand jury subpoenas calling for fee information were issued to attorneys who represented clients in a current matter, either criminal or civil, and only sixteen subpoenas calling for fee information were issued to attorneys who had previously represented a client. These subpoenas were issued to obtain evidence to establish that the client had substantial income which was unreported for tax purposes, or that the client generated substantial income from his criminal activity, or that the client's fee was a "benefactor" payment to show that the fee payor was the head of a criminal organization. We should note, however, that if the fee information discloses the existence of a bank account or some other account at a financial institution, that information may be relevant and useful for purposes of tracing other forfeitable assets. We do not have any information as to how effective grand jury subpoenas issued for fee information are in this regard.

An attorney may be asked any questions that do not violate the attorney-client privilege. Generally, the courts have found that the attorney-client privilege protects information which is communicated in confidence and which is necessary to be communicated from the client to the attorney in order to secure the advice of counsel. With respect to fee information, the courts uniformly have held that information concerning the amount, source, and method of payment, and in most cases the identity of the fee payor is not covered by the attorney-client privilege. The courts have reasoned that while the payment of a fee may be a necessary pre-requisite to obtaining legal services, communication of information concerning the fee is not necessary to obtaining legal advice about the underlying matter. See, e.g. In re Shargel, 742 F.2d 61 (2d Cir.1984); In re Witnesses Before Special March, 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984); United States v. Sherman, 627 F.2d 189 (9th Cir. 1980).

> Question 4: Do you believe that forfeiture of attorneys' fees will cause a criminal defense attorney to compromise his representation in an effort to protect his fee?

We do not believe that forfeiture of attorneys' fees will cause a criminal defense attorney to compromise representation of the client in order to protect the fee. The primary protections against such action are the ethical obligations imposed upon an attorney which are enforceable by disciplinary authorities.

At the outset, an attorney is prohibited from commencing representation if he or she believes a conflict may exist between the interest of a client and the attorney's self interest. Rule 1.7 of the Model Rules of Professional Conduct of the American Bar Association provides in subpart (b) that a lawyer

> "shall not represent a client if representation of that client may be materially limited by the ... lawyer's own interest, unless: (1) the lawyer reasonably believes

> the representation will not be adversely affected; and (2) the client consents after consultation."

Obviously, this precludes an attorney from undertaking representation of a client if the attorney's interest in preserving his or her fee is so substantial that the attorney does not reasonably believe the representation will be unaffected by the attorney's desire to protect his or her economic interest.

If a conflict between preserving the fee and representing the the client does not arise until after representation begins, the canons of the Model Rules provide that the attorney's first duty is one of undivided loyalty to the client. Thus, if there is a conflict between the attorney's self interest in preserving the fee and the client's interest in accepting a disposition of the criminal case that may lead to forfeiture of the fee, the attorney is duty bound to act in the best interest of the client. To do otherwise unquestionably would be a breach of ethics.

It is important to recognize that an attorney's duty in these situations is different than the duty that arises when there is a conflict of interests between two clients. When an attorney represents two clients, an equal duty of undivided loyalty is owed to each client, and the attorney may not favor the interest of one client over the other. Therefore, if there is a conflict, the attorney faces an unavoidable ethical dilemma and must withdraw from representation of one or both clients. However, when the clients' best interest competes with the attorney's own personal economic interest, the attorney has no ethical obligation to preserve his or her fee. Thus, the conflict poses no ethical dilemma; the attorney's only obligation is to do what is best for the client.

We believe that defense attorneys will follow these rules and act ethically. Moreover, if some attorneys do not and sacrifice their clients' interests in order to protect their fees, serious issues as to the effective assistance to counsel may exist which can be raised by the clients in collateral attacks on their convictions. Consequently, the clients will not suffer in such cases, and the attorneys can be disciplined appropriately.

Question 5: Does the 6th Amendment encompass the right of a defendant to employ counsel of his or her own choice? Is this a limited or qualified right?

Once the right to counsel under the sixth amendment attaches, an individual has the right to counsel of choice. But this right to counsel of choice is neither absolute nor unqualified. A court may restrict a defendant's choice when there is a significant countervailing public interest. See e.g., United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979), cert. denied, 442 U.S. 913 (1979); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Gary, 565 F.2d 881, 887 (5th Cir. 1978), cert. denied, 435 U.S. 955 (1978); United States v. Robinson, 553 F.2d 429, 430 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).

The most elementary limitation upon the right to counsel of choice is that the defendant must have the funds to pay counsel. If a defendant does not have funds to pay counsel, he or she is entitled to an appointed attorney but not to funds to hire an attorney of choice. Moreover, even if a defendant has the funds to pay for an attorney of choice, a court still can restrict that choice if there is a significant countervailing public interest. Such an interest has been found to exist where an attorney who is selected by a defendant would be impermissibly representing two clients with conflicting interests or where the substitution of new counsel of choice might delay or hinder a pending trial. We believe that a sufficient countervailing interest also exists where the funds which a defendant uses to pay an attorney of choice are illegitimate.

Question 6: What effect do you believe forfeiture has on the prompt, effective, and efficient disposition of narcotics and racketeering cases?

In view of the ethical obligations of an attorney, we do not believe that forfeiture of fees or the potential for forfeiture of fees has any substantial direct effect upon the prompt, efficient, and effective disposition of narcotics and racketeering cases. We believe that attorneys will abide by their obligation to act in best interest of their clients in all cases. If the best interest of the client is to reach an early plea agreement or otherwise dispose of the case at an early stage, the attorney's duty is to so advise the client and to undertake to obtain such a disposition on behalf of the client. Nothing in our experience to date suggests that anything to the contrary is occurring.

We do note that where attorneys are concerned about protecting their fees prior to entering into a case, the potential for forfeiture has had some indirect impact upon the promptness of the disposition of narcotics and racketeering cases. Some attorneys have requested the court prior to trial to declare that any money received as fees will be exempt from forfeiture. We believe that it is improper for a court to issue an order exempting fees from forfeiture without some showing that the fee is from a legitimate source. Consequently, there has been some ancillary pre-trial litigation concerning fees that has delayed disposition of some cases. However, once the question of the forfeitability of fees is clearly resolved either by Congress or the Courts of Appeals, such litigation should dissipate.

Question 7: If a narcotics client retains an attorney with $100,000 cash in small, brown grocery bags, what steps, if any, should the defense attorney take to determine if the cash fee was generated by illicit narcotics activity?

Where a forfeiture count has been included in criminal charges against a client, the attorney should take whatever steps he or she believes are necessary to insure that equitable relief can be obtained in the event of a conviction and a judgment of forfeiture. In practical terms, this means that where an attorney receives payment of a fee under circumstances which would reasonably cause any other person to believe that the money involved is subject to forfeiture, the attorney should inquire of the client as to the actual source of the fee. If the client provides reasonable and credible assurances that the fee is from a legitimate source or a source not alleged to be forfeitable, the fee should be immune from forfeiture since the attorney would be able to meet his or her burden in order to obtain equitable relief under 18 U.S.C. §1963(m)(6) or 21 U.S.C. §853(n)(6).

We emphasize that whether it is necessary for an attorney to inquire of the client or demand assurances as to the source of the fee depends upon the particular facts of each case. The attorney need only make such inquiry where the relevant facts — including such things as the language of the forfeiture count, the manner and mode of payment of the fee and the client's apparent source of livelihood or lack thereof -- reasonably would indicate to an ordinary person that the fee is being paid from an illegitimate source. In such cases, if the attorney inquires of the client and is not satisfied that the fee is being paid from a legitimate source, the attorney should demand payment from some other source. If there appear to be no assets which are not subject to forfeiture from which payment can be made, the client and the attorney can apply to the court for appointment under the Criminal Justice Act, 18 U.S.C. §3006A.

We believe it is relevant in answer to this question to point out that our guidelines direct our attorneys to assist defense attorneys in identifying legitimate sources of assets. (See §9-111.700) Moreover, if an attorney is willing to make a proffer as to the source of a fee, an agreement can be entered into by the United States Attorney to exempt the fee from forfeiture. The guidelines, therefore, provide additional protection beyond that provided under the equitable relief provisions of the statutes to attorneys who inquire as to the source of the fee.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

Enclosures

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

18 APR 1986

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This responds to your letter of March 6, 1986, asking several questions concerning the issuance of subpoenas to attorneys for information relating to clients and the forfeiture of attorneys' fees. Before answering your specific questions, I would like to provide some preliminary information which will aid in understanding our responses.

On July 18, 1985, the Department of Justice adopted a policy requiring that all subpoenas issued to attorneys for information relating to a client be approved by the Assistant Attorney General of the Criminal Division. Therefore, we have been able to compile substantial information concerning the issuance of subpoenas from that date through and including February 28, 1986. The total number of grand jury subpoenas authorized during that time period was 169. An analysis of these grand jury subpoenas reveals some very pertinent information.

1. Only 45 of the subpoenas were directed to attorneys for information concerning a client who was currently represented by the attorney.

> Twenty-six of these subpoenas were issued to attorneys who currently represented the client with respect to the grand jury investigation. Six of these subpoenas sought corporate or financial records of the client which had been prepared by the same attorney or were simply in the attorney's possession. Of the remaining 20 subpoenas, six called for fee information concerning the current representation and three called for fee information with respect to representation on other matter, principally to establish financial gain for purposes of a tax and/or Continuing Criminal Enterprise ("CCE") investigation; seven sought information where the attorney had been a fact witness to unprivileged information or had rendered advice or assistance to the client with respect to the conduct under investigation, which was relevant to such things as a potential advice of counsel defense; and the remaining four were issued for information to be used against someone other than the client, three of which were limited to fee information needed to prove that the client's fee represented a "benefactor" payment, i.e., that the manager of a criminal enterprise had paid the fee for the client.
>
> Nineteen of these 45 subpoenas were issued to attorneys who currently represented the client on a matter other than the grand jury investigation, such as a civil matter. In five instances the information was sought for use against someone other than the client; for example, where the client was a victim of fraud or other wrongdoing and the information was

sought for use against the perpetrator of the fraud. In the 14 instances in which the attorney was subpoenaed for information to be used against the client, five subpoenas called for information concerning the fee paid in the civil matter, principally for use in a tax and/or CCE investigation. The other nine subpoenas called for a variety of information, including such things as documents in possession of the attorney concerning the client's financial transactions for use in a tax or CCE investigation or the advice or assistance given to the client with respect to conduct which was the subject matter of the grand jury investigation and which again was relevant to a potential advice of counsel defense. (In this latter situation the attorney-client privilege had been waived or otherwise did not apply because of the crime-fraud exception to the privilege.)

2. The vast majority of the remaining subpoenas, 112, were issued to attorneys whose representation of the client had ceased.

Of these subpoenas, only 26 were issued to attorneys who previously had represented the client on a criminal matter. Eleven of these subpoenas sought information for use against someone other than the former client; for example, nine of these subpoenas sought fee information concerning the prior representation to prove that the client's fee was a benefactor payment for use in an investigation of the head of the criminal enterprise. The remaining fifteen subpoenas sought information for use against the former client, and they called for fee information concerning the prior matter (seven subpoenas); for information relevant to an obstruction of justice charge arising out of the prior criminal matter (four subpoenas) or the client's failure to appear at proceedings concerning the prior criminal matter (three subpoenas); or for corroboration of the testimony of a client who had agreed to cooperate with the government (one subpoena).

The 86 other subpoenas were issued to attorneys who had previously represented the client on civil matters. Twenty-six of these subpoenas were for information to be used against someone other than the former client. These subpoenas sought such things as fee information (one subpoena); corporate, financial or real estate records of the client (twelve subpoenas); information concerning the attorney's representation of the victims of the criminal activity under investigation (four subpoenas); financial information concerning the attorney (seven subpoenas); or other evidence relevant to potential misconduct by the attorney (two subpoenas).

The remaining 60 subpoenas sought information concerning the prior civil representation for use against the former client. Of these, approximately 45 called for such things as information concerning the fee paid in the prior matter; documents concerning financial or real estate transactions of the client, including documents relevant to the preparation of the client's tax returns; documents concerning the formation of a corporation, partnership or trust for the client; or documents of a client's corporation or other business entity, such as by-laws and minutes in the possession of the attorney. Approximately 15 of the subpoenas called for information concerning the prior civil matter where that same matter was the subject matter of the grand jury investigation. In some cases these subpoenas called for information concerning the advice or representation rendered by the attorney to the client in that matter.

We believe that this information is helpful in understanding the context in which grand jury subpoenas have been issued to attorneys. It also indicates that the potential that an attorney will be disqualified because he or she may be made a witness against the client at trial does not exist in most cases. Disqualification generally will be a concern only where the attorney currently represents the client in the criminal investigation and the information sought from the attorney is to be used against the client. This has occurred in only about 22 of the subpoenas noted above. Even then, disqualification is not inevitable since information may be introduced at trial by stipulation or some means other than calling the attorney as a witness. With these preliminary observations in mind, we will address each of your questions as best we can.

Question 1: "How many subpoenas have been issued to defense attorneys to present evidence to a grand jury regarding representation of a client?"

As discussed above, grand jury subpoenas have been issued to a number of attorneys who have represented clients on civil as well as criminal matters. By "defense attorneys" we believe you are referring to attorneys who were representing clients on criminal matters at the time the subpoena was issued or who were being subpoenaed to provide information about a client they had previously represented on a criminal matter. A total of 52 subpoenas were issued to attorneys who were representing or had represented clients on criminal matters: 26 in situations where the attorneys currently represented the clients in the grand jury investigations and 26 where the attorneys had previously represented the clients on other criminal matters. Only thirteen subpoenas were issued to attorneys who were currently representing clients on criminal matters for information concerning the current representation, and six of these were limited to fee information. Of the remaining thirteen subpoenas issued to attorneys currently representing clients on criminal matters, four sought information for use against someone other than the client and nine called for information concerning a different matter on which the attorney had represented the client.

Question 2: "How many subpoenas have been issued in RICO and Continuing Criminal Enterprise cases?"

Fifteen grand jury subpoenas have been issued to attorneys for information concerning clients in eleven grand jury investigations of potential RICO charges. Twenty-four grand jury subpoenas have been issued to attorneys for information concerning clients in 15 grand jury investigations of potential CCE charges. One subpoena was issued to an attorney for information concerning a client in a grand jury investigation concerning a joint RICO/CCE charge (one investigation).

Question 3: "How many subpoenas have been issued in cases where charges were subsequently brought against attorneys?"

An attorney may be a target or subject of a grand jury investigation without ever being subpoenaed to provide information concerning representation of a client. Thus, we do not understand your question as referring to all grand jury investigations where charges ultimately were brought against an attorney, but only to those investigations where charges were brought against an attorney after the attorney was subpoenaed to provide testimony or documents concerning a client. There were 21 grand jury investigations in which subpoenas were issued to attorneys where the attorneys were identified as targets or potential targets. The investigations concerned money laundering activity (five investigations), kickbacks and bribery activity concerning governmental entities or unions (five investigations), obstruction

of justice (four investigations), various types of fraudulent activity (four investigations), extortion (one investigation), trading with the enemy (one investigation) and potential substantive involvement in a RICO/CCE violation.

Question 4: "How many disqualification motions were filed by attorneys in cases where they were subpoenaed to present evidence to grand juries?"

A motion to disqualify is not filed by the attorney, but may be filed by the government when an attorney has a conflict of interests and refuses to withdraw from representation. If an attorney who has been subpoenaed to a grand jury wishes to terminate his representation voluntarily or believes that he must do so because of ethical or other considerations, no formal motion is required. As a general rule, an attorney must file a motion to terminate representation of a client only when the representation is with respect to pending charges, in which case a motion to withdraw is filed. We do not maintain the records which would enable us to provide you with the number of motions to withdraw filed by attorneys after charges have been filed.

Question 5: "How many disqualification motions were filed against attorneys who had been subpoenaed to present evidence to grand juries?"

We are not aware of any motions to disqualify attorneys made solely on the ground that an attorney has been subpoenaed before a grand jury. A motion to disqualify an attorney at the grand jury stage based solely on the ground that the attorney was subpoenaed before the grand jury would be premature. Instead, disqualification motions at the grand jury stage are based upon the attorney's conflict of interests; for example, where the attorney represents multiple targets of an investigation or is a target of the investigation. This is because there is no certainty that an attorney will testify against the client at trial simply because the attorney has appeared before the grand jury. And, in the absence of a conflict, it is the testimony at trial that provides the grounds for disqualification.

At most a grand jury appearance may indicate that an attorney potentially may be subject to disqualification at the time of trial. However, this is true only in those situations where the attorney currently represents the client in the grand jury investigation and is subpoenaed for information to be used against the client in that investigation. Even then, the prospect of disqualification is somewhat speculative, particularly where the testimony concerns the attorney's fee or the production of documents only and the evidence can be introduced by stipulation. (An excellent explanation of the many contingencies which must be satisfied before disqualification based on a grand jury appearance becomes imminent is contained in Roe v. United States, 781 F.2d 238 (2d Cir.), cert. denied (April, 1986). (A copy of the opinion is enclosed).)

Of the 169 grand jury subpoenas issued, we could identify only 22 which were issued to attorneys currently representing persons in grand jury investigations for information to be used against the client. Nine of these subpoenas called for fee information and six called for documents only concerning past civil matters such as corporate or financial records, and stipulations could be used to introduce most of that evidence at trial. Thus, a substantial potential for disqualification existed in only seven cases.

Question 6: "In how many cases has the Justice Department sought forfeiture of attorneys fees?"

In March, 1985, the Department adopted a policy requiring that the Assistant Attorney General, Criminal Division, approve any criminal or civil proceedings seeking forfeiture of assets paid to an attorney as fees for legal services. On September 18, 1985, guidelines were issued concerning the requirements that must be satisfied to obtain that approval. When the assets have been transferred in payment for legitimate services actually rendered in a criminal matter, the Assistant Attorney General can approve the forfeiture only if the attorney had actual knowledge at the time of the transfer that the assets were subject to forfeiture. See United States Attorneys' Manual § 9-111.430. (A copy of the relevant sections of the United States Attorneys' Manual is enclosed.)

Since the date of the policy requiring the prior approval of the Assistant Attorney General, authorization has been granted in a total of six cases. Only one case involves assets which have actually been transferred to the attorney.

In this case, authorization has been granted to seek forfeiture of a fee already paid to an attorney for representing the client in a current criminal case. Our investigation revealed that the attorney knew that the client had paid him with funds which were subject to forfeiture. The attorney has been informed that steps might be taken to forfeit the fee in the event the client is convicted and a forfeiture judgement is obtained; however, no proceedings have as yet been instituted to forfeit the fee nor has it been included in the forfeiture count of the pending indictment. The district court in which the criminal charges are pending has granted a motion by the attorney to exclude from forfeiture any assets transferred to him by the client for representation in the current matter. We are waiting for the court to issue its opinion before deciding if any further action will be taken.

In the five remaining cases in which authorization has been granted, none of the assets have actually been transferred to the attorneys. Instead, the clients have merely assigned their interests in the assets which are the subject of the forfeiture proceedings. The attorneys have filed third-party claims and the United States Attorneys have been authorized to contest the claims of the attorneys.

Four of these cases involve civil proceedings that were instituted to forfeit currency that was seized by state or local authorities as evidence or proceeds of a crime. (Some of these proceedings had been initiated prior to time that the approval of the Assistant Attorney General was required. The United States Attorneys, however, obtained approval to continue contesting claims by attorneys that they had superior rights to the assets.) The currencies that are the subjects of these proceedings were assigned to the attorneys for representation to be rendered on state or local criminal charges after the currency had been seized. In none of these cases had the currency actually been paid to the attorney, but it remained in the possession of the law enforcement agencies.

The fifth case involves a criminal forfeiture. In this case, two defendants were convicted on RICO charges, and an order of forfeiture was entered forfeiting certain property which had been alleged to be subject to forfeiture in the indictment. Thereafter, the attorneys for the defendants filed a third party claim, alleging that a lien securing payment of the attorneys' fees for representation in the matter had been executed by the defendants on the forfeited

property. Authorization was granted to contest the attorneys' claim to the property since the lien was executed after return of the indictment containing a forfeiture count particularly describing the property upon which the lien was executed.

Two additional cases should be noted with respect to this question. There is one case where an investigation is currently being conducted that could lead to forfeiture of the attorney's fee. In this case, the criminal proceedings against the client have been completed; the client having been convicted and his assets having been forfeited. The investigation principally concerns allegations that the attorney violated a pre-trial restraining order by accepting certain assets during the pendency of the trial in payment of his fee. No request for authorization to forfeit the fee has been made at this time. However, depending upon the outcome of the investigation, forfeiture might be sought if the assets accepted by the attorney in fact were assets that were subject to forfeiture and restrained by the court.

The other case involves a claim by a defendant's attorneys to be paid from assets that had never been transferred or assigned to them and that had been ordered forfeited. In this case, after the defendant was convicted pursuant to plea and after an order of forfeiture was entered, the attorneys filed a motion seeking payment of the accrued fees from the forfeited assets. The court granted the request over the government's objections. The Department is considering whether it should appeal the district court's decision.

Question 7: "In how many of such cases did the Justice Department prevail?"

The four civil forfeiture proceedings are still pending and the courts have not decided the validity of the attorneys' claims. The one criminal forfeiture proceeding is also pending and unresolved. As noted above, the final case is one where authorization has been granted but no proceedings have been initiated to forfeit the fee. The court, however, has exempted the attorney's fees from forfeiture and the government may appeal that ruling.

Question 8: "In how many cases was the payment of attorneys fees precluded by virtue of a pre-trial restraining order obtained under the RICO or Continuing Criminal Enterprise Statute?"

There has been one case in which a court has refused to modify a restraining order to exclude amounts to be paid to attorneys. In that case, the district court agreed with the government that the defendant had not made any showing that he was without other funds to pay his attorney. The client has appealed the district court's decision to the court of appeals, and the matter is now pending in that court.

In three cases the courts either have refused to issue pre-trial restraining orders or have modified previously issued orders to exclude funds which the defendant proposed to use for attorney's fees. The courts concluded that the forfeiture statutes were not intended to apply to "legitimate" attorneys' fees. The courts reached this result based primarily on their conclusion that the Sixth Amendment right to counsel precludes application of the forfeiture statutes

to money or assets paid to an attorney for representation in a criminal matter. Therefore, the courts reasoned, Congress could not have intended the statute to apply to any legitimate attorney's fees. In none of the cases was there a showing that the attorneys' fees could not be paid because of the restraining order.

I hope that these answers are helpful. If you need any further information or clarification, please let me know.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

Enclosure

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

SEP 18 1985

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Policy With Regard to Forfeiture of Assets Which Have Been Transferred to Attorneys As Fees for Legal Services.

NOTE:
1. This is issued pursuant to USAM 1.150.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9-110.000.

AFFECTS: USAM 9-111.000

PURPOSE: This bluesheet implements new guidelines concerning Forfeiture of Assets Which Have Been Transferred to Attorneys As Fees for Legal Services.

The following are new sections which should be inserted in the USAM at 9-111.000.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 111

9-111.000 POLICY WITH REGARD TO FORFEITURE OF ASSETS WHICH HAVE BEEN TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

9-111.100 FORFEITURE UNDER RICO (18 U.S.C. 1963) AND DRUG FELONY STATUTES (21 U.S.C. 853)

9-111.200 APPLICATION OF FORFEITURE PROVISIONS TO ASSETS TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

9-111.210 Sixth Amendment Considerations

9-111.220 Congressional Intent

9-111.230 Policy Limitations On Application Of Forfeiture Provisions to Attorneys Fees

9-111.300 DIVISION APPROVAL

9-111.400 ATTORNEY FEE FORFEITURE GUIDELINES

9-111.410 Forfeiture of Assets Transferred To An Attorney In A Fraudulent Or Sham Transactions

9-111.420 Forfeiture of Assets Transferred To An Attorney For Representation In A Civil Matter

9-111.430 Forfeiture of Assets Transferred To An Attorney For Representation In A Criminal Matter

9-111.500 DISCUSSION OF ACTUAL KNOWLEDGE AND/OR REASONABLE CAUSE TO KNOW

9-111.510 Actual Knowledge of Forfeitability

9-111.511 Knowledge That The Government Has Asserted That A Particular Asset Is Subject To Forfeiture

9-111.512 Knowledge That The Asset In Fact Is From Criminal Misconduct

9-111.520 Reasonable Cause To Know That An Asset Is Subject To Forfeiture

9-111.530 Policy Concerning Issuance Of Notification Letters To Attorneys

9-111.600 DISCOVERY OF INFORMATION CONCERNING AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

9-111.610 Compelled Disclosure of Confidential Communications During The Course Of The Representation

9-111.620 Subpoenas Issued To Attorneys To Obtain Fee Information

9-111.630 Post-Judgment Discovery Proceedings Under 18 U.S.C. 1963 and 21 U.S.C. 853

9-111.700 AGREEMENTS TO EXEMPT FROM FORFEITURE ASSETS TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

9-111.200

POLICY WITH REGARD TO FORFEITURE OF ASSETS WHICH HAVE BEEN TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES.

9-111.100 Forfeiture Under RICO (18 U.S.C. 1963) And Drug Felony Statutes (21 U.S.C. 853)

The Comprehensive Crime Control Act of 1984 [1] comprehensively revised criminal forfeiture law and procedure. Thus (18 U.S.C. §1963(c) and 21 U.S.C. §853(c)) provide that criminal forfeitures under sections 1963(a) and 853(a), respectively, "relate back" to the commission of the act which gives rise to the forfeiture. Thus, the interest of the United States in the property vests at that time and is not extinguished simply because a defendant subsequently transfers the property to another person. As explained in the Senate Report: "Absent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction." [2] S. Rep. No. 98-225, 98th Cong., 1st Sess. at 200 (hereafter S. Rep.) (footnote omitted). More specifically, the report notes that "[the purpose of this provision is to prevent the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length transactions." Id. at 200-201.

As an equitable measure, 18 U.S.C. §1963(n) and 21 U.S.C. §853(n) both provide that forfeiture shall not be ordered if a transferee establishes, at a hearing pursuant to section 1963(m) or 853(n), that he was a bona fide purchaser and was reasonably without cause to believe that the property was subject to forfeiture.

9-111.200 Application of Forfeiture Provisions To Assets Transferred To Attorneys As Fees For Legal Services.

As a result of the amendments to the forfeiture provisions, assets transferred by a defendant to an attorney for payment of legal fees may be subject to forfeiture if the government proves

---

1/ Pub. L. 98-473, 98 Stat. 1837 (hereinafter, 18, 1984).

2/ The Senate Report also noted that the 18 U.S.C. §1963(c) codified "the 'relate' doctrine which has long been recognized in forfeiture cases." Indeed, under most civil forfeiture statutes, the forfeiture relates back to the time of the act which gives rise to it. See, e.g., United States v. Stevens, 910 F.2d [illegible] (9th Cir. 1990); United States v. [illegible], 707 F.2d [illegible] (9th Cir. 1983); [illegible] v. [illegible], 6th Cir. 1982); [illegible] v. [illegible], 10th Cir. 1980); [illegible] v. [illegible], 5th Cir. 1980). The Seventh Circuit, however, has interpreted the government's argument that the "relation back" doctrine was applicable to criminal forfeitures. See, United States v. Alexander, 741 F.2d 962 (7th Cir. 1984); United States v. Ginsberg, 773 F.2d 798 (7th Cir. 1985); United States v. Rogers, 788 F.2d 276 (7th Cir.), cert. denied, [illegible] 712 F.2d 183 (7th Cir. 1983). Thus, the Ninth Circuit's effectively reverses the Seventh Circuit's holding in Alexander and Rogers.

that the fee in fact was paid from assets that are forfeitable. An attorney would be entitled to keep the assets only if he could prove at a post-forfeiture proceeding that he was a bona fide purchaser and was reasonably without cause to know the asset was subject to forfeiture.

9-111.210 Sixth Amendment Considerations.

The Sixth Amendment guarantees a defendant the absolute right to counsel in Federal criminal prosecutions that may result in imprisonment. Scott v. Illinois, 440 U.S. 367, 373 (1979); see Arsinger v. Hamlin, 407 U.S. 25, 37 (1972)(defendant may not be imprisoned unless afforded the right to counsel). Accordingly, a defendant who establishes indigency is entitled to the assistance of court-appointed counsel at each critical stage of the proceedings, including the first appeal as of right. See, e.g., 18 U.S.C. §3006A; Fed. R. Crim. P. 44(a). Additionally, a solvent defendant is entitled to retain counsel of choice. But this guarantee of the right to counsel of choice is neither absolute nor unqualified. A court may restrict a defendant's choice when there is a significant countervailing public interest. 3/

Some district court's have held that the third party forfeiture provisions interfere with a defendant's Sixth Amendment rights when they are applied to legitimately paid attorney fees. See e.g., United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985), United States v. Badalamenti, 84 CR. 236 (PNL) (S.D. N.Y. July 10, 1985); United States v. Ianiello, S 85 Cr. 115 (CBM) (S.D. N.Y., Sept. 3, 1985). As a result, they have reasoned, the statutes must be construed to exempt legitimate attorney fees from forfeiture to avoid unconstitutionality. The Department believes, however, that these decisions are incorrect.

The application of the third party forfeiture provisions to attorney fees impacts only the qualified right to counsel of choice and not a defendant's absolute right to be represented at all critical stages. A defendant who is effectively rendered indigent by their potential application is entitled to appointed counsel. Cf., United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979) ("the ... restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel, if he has no means to hire an attorney."); see also, United States v. Brodson, 241 F.2d 107 (7th Cir.) cert. denied, 354 U.S. 911 (1957).

The impact of the third party forfeiture provisions upon the ability to obtain counsel of choice in any event has been severely overstated and does not amount to an unconstitutional interference. The third party forfeiture provisions do not prohibit a defendant from paying attorney fees with assets which have not been generated or obtained from criminal activity. Additionally, if prior to conviction a defendant voluntarily restrains sufficient property to satisfy the judgment of forfeiture, it will not be necessary for the government to void

---

3/ See e.g., United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979), cert. denied, 442 U.S. 913 (1979); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Gary, 565 F.2d 881, 887 (5th Cir. 1978), cert. denied, 435 U.S. 955 (1978); United States v. Robinson, 553 F.2d 429, 430 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).

any third party transfers. The same may be true even in the absence of a pretrial restraint if the defendant has sufficient funds at the time of the judgment of forfeiture to satisfy it. 4/ Also, a defendant who is indigent by virtue of a restraining order may have counsel of choice appointed, provided counsel is willing to accept appointment under the Criminal Justice Act. Finally, if a defendant transfers forfeitable assets to an attorney and has no assets to satisfy a forfeiture judgment, an attorney still can retain the fee if he was an unwitting participant and can establish by a preponderance of the evidence that he was reasonably without cause to believe the property was subject to forfeiture.

In view of the foregoing, the argument that the forfeiture provisions are constitutional only if they exempt attorney fees is an extreme and unwarranted interpretation of the Sixth Amendment. It amounts to arguing that the qualified right to counsel of choice includes the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity. The Sixth Amendment does not incorporate any such guarantee. Perhaps the most elementary qualification on the right to counsel of choice is economic. A defendant is entitled only to counsel of choice who he can afford. See United States v. Rogers, 471 F. Supp. 847, 851 (E.D. N.Y. 1979) ("Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney".) If a defendant cannot afford a particular attorney, he is not entitled to have the government provide funds to pay that attorney. But that is what would happen if forfeitable assets transferred to an attorney were exempt from the third party forfeiture provisions. 5/

Most courts have not directly confronted the question of whether the subsequent forfeiture of assets transferred to an attorney for legitimate fees violates the qualified right to

---

4/ After obtaining a forfeiture judgment, the government may be entitled to satisfy the judgment from any funds in the hands of the defendant even if it cannot trace those funds. In United States v. Conner, 752 F.2d 566 (11th Cir. 1985), the court held that the government has no duty to trace cash proceeds of racketeering to specific assets owned by the defendant at the time of the forfeiture verdict in order to forfeit such assets. Presumably, the government may collect the forfeited sum from any assets owned by the defendant. As the court noted, "[m]oney is a fungible item. It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is in personam and is money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1) [RICO]." Id. at 576.

5/ Upon conviction, a defendant is divested of any title to forfeitable assets, and title passes to the United States as of the date of the offense. In the case of the forfeitable proceeds generated by the crime itself (e.g., proceeds of drug trafficking, loan sharking, bribery), operation of the relation back doctrine means that a convicted defendant is not just divested of any interest but that he never acquires any interest in such property. Unquestionably, to argue that such property may be used to pay counsel is to argue that the government must subsidize the payment of counsel of choice. But the Sixth Amendment only requires that counsel be appointed if a defendant cannot afford counsel, and the appoint does not have to be counsel of choice.

counsel of choice. Several courts, however, have held that a defendant can be prevented from using assets which are subject to forfeiture to pay counsel of choice. See, e.g., United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, 105 S. Ct. 133 (1984); United States v. Long, 654 F.2d 911, 915-17 (3d Cir. 1981); United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979). The only cases to actually consider application of the third party forfeiture provisions to attorney fees are United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) and United States v. Ianniello, S 85 Cr. 115 (CBM) (S.D. N.Y. Sept. 3, 1985). 6/

As noted above, these court held that any "legitimate" attorneys' fees and costs are immune from forfeiture, apparently even if the attorney knows they are being paid with forfeitable assets. The holdings, however, were based principally upon the courts' reading of congressional intent and only secondarily on constitutional grounds. The courts surmised that Congress intended the third party forfeiture provisions to apply only to sham transactions and not to transfers for legitimate fees. As discussed below, the Department believes that the courts' conclusion concerning Congressional intent is erroneous.

9-111.220 Congressional Intent.

There is very little from which to conclude that Congress intended to create an exemption for attorney's fees from the operation of the third party forfeiture provisions. Indeed, such a conclusion effectively would render meaningless the "reason to know" requirement for equitable relief. More significantly, however, it is facially contrary to the plain language and history of the legislation.

The statutes themselves do not contain any language exempting from their operation property which an attorney accepts as payment for legal services and which he has reasonable cause to know is subject to forfeiture. In subsections (c) both statutes simply state that property subject to forfeiture becomes so at the time of the offense and in subsections (a) they define the types of property subject to forfeiture. None of the subsections contain any exception for property transferred to attorneys for legal fees.

The legislative history indicates that Congress explicitly rejected the notion that attorney fees are exempt from forfeiture. The Senate Report cited with approval United States v. Long, 654 F.2d 911 (3d Cir. 1981), which it characterized as "holding that property derived from a violation of 21 U.S.C. §848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorney from transferring or selling the property was properly entered." S. Rep., supra, at 200 n. 28.

Exemption of attorney fees also would undermine substantially the purpose of the third party forfeiture provisions. As the district court in In Re Grand Jury Subpoena, (Simels), No. M-11-188 (DNE) (S.D. N.Y., March 11, 1985) rev'd on other grounds, No. 85-6066 (2d Cir. June 27, 1985) stated: "[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime,

---

6/ Badalamenti, supra, discussed the issue in dicta in considering a motion to quash a subpoena to an attorney.

he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds .... To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power." Slip op. at 18, n. 14. It is hard to overestimate how significantly Congress' intent could be undermined by excluding attorney fees. A defendant could take full advantage of his ill-gotten gain by intentionally transferring tainted assets in payment of attorneys fees and retaining only legitimate assets. 7/

9-111.230 Policy Limitations On Application Of Forfeiture Provisions To Attorney Fees.

While there are no constitutional or statutory prohibitions to application of the third party forfeiture provisions to attorneys fees, the Department recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the requirements for equitable relief without hampering their ability to represent their clients. In particular, requiring an attorney to bear the burden of proving he was reasonably without cause to believe that an asset was subject to forfeiture may prevent the free and open exchange of information between an attorney and a client. The Department recognizes that the proper exercise of prosecutorial discretion dictates that this be taken into consideration in applying the third party forfeiture provision to attorney fees. Accordingly, it is the policy of the Department that application of the forfeiture provisions to attorney fees be carefully reviewed and that they be uniformly and fairly applied.

9-111.300 Division Approval.

No forfeiture proceedings under 18 U.S.C. 1963 or 21 U.S.C. 853 may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

7/ The conclusion that attorney fees constitutionally can be forfeited upon conviction also dispenses with the additional argument that the threat that attorney fees may be forfeited unconstitutionally interferes with the right to counsel of choice. It is axiomatic that if forfeiture of fees upon conviction does not violate the right to counsel of choice, then the threat that forfeiture might occur also does not violate that right. Moreover, in the absence of a restraining order, the inability to retain counsel when forfeiture is alleged is due solely to counsel's desire to be guaranteed payment of his fee. In this regard, the third party forfeiture provisions are not unlike other economic limitations. They mean only that the government's claim to forfeitable assets is superior to any other claims arising after commission of the offense, including counsel's claim to a fee. This does not interfere with a defendant's ability to retain counsel any more than a prior mortgage or tax lien which may encumber a defendant's assets. If counsel refuses to represent a prospective client because he believes that the client does not have the financial ability to pay as a result of these prior encumbrances there is no interference with the right to counsel of choice. Likewise, the forfeiture provisions do not impermissibly deny a defendant his counsel of choice.

No civil forfeiture proceedings under any statute may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No formal or informal, written or oral, agreements may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture under 18 U.S.C. 1963 or 21 U.S.C. 853 or any civil forfeiture statute without the prior approval of the Assistant Attorney General, Criminal Division. (See Section 9-111.700, infra.)

9-111.400 Attorney Fee Forfeiture Guidelines.

The purpose of these guidelines is twofold. First, it is to insure that any forfeiture of assets transferred to attorneys as fees for legal services has been reviewed carefully. Second, it is to insure that the public's interest that those convicted of certain offenses do not realize any economic benefit from their illegal activity is pursued fairly and with due consideration for the individual's right to counsel in a criminal matter.

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

9-111.410 Forfeiture of Assets Transferred To An Attorney In A Fraudulent Or Sham Transaction.

Forfeiture of an asset transferred to an attorney as fees for legal services may be pursued where there are reasonable grounds to believe that the transfer is a fraudulent or sham transaction designed to shield from forfeiture assets which otherwise are forfeitable.

The mere fact that an attorney has received a forfeitable asset as payment for legal fees by itself does not provide reasonable grounds to believe the transfer was a fraudulent or sham transaction. There must be reasonable cause to believe the asset was transferred for the purpose of impeding or defeating the government's ability to forfeit it. Generally, there should be some proof that a scheme existed to maintain the client's interest in the asset or ability to use it to his benefit. This may be shown, for example, by proof that the value of the asset transferred far exceeded the value of services actually rendered and that there was agreement by the attorney to transfer the asset or some portion of it back to the client. In other situations there may be evidence that the attorney agreed to transfer the asset to another third party for the benefit of the client or to an account or corporation that is controlled by the client. The evidence, however, need not establish that the attorney was a participant in the criminal activity giving rise to the forfeiture or that he otherwise violated any law.

9-111.420 Forfeiture Of Assets Transferred To An Attorney For Representation In A Civil Matter.

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a civil matter may be

pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, when there are reasonable grounds to believe that the attorney had reasonable cause to know that the asset was subject to forfeiture at the time of the transfer. (See Section 9-111.520, infra.)

9-111.430 Forfeiture of Assets Transferred To An Attorney For Representation In A Criminal Matter.

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, where there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer. However, such reasonable grounds must be based on facts and information other than compelled disclosures of confidential communications made during the course of the representation. (See Sections 9-111.512 and 9-111.610, infra.)

9-111.500 Discussion of Actual Knowledge And/Or Reasonable Cause To Know.

The principal issue to be addressed in the application of these guidelines is what constitutes "actual knowledge" or "reasonable cause to know" that an asset is subject to forfeiture "at the time of the transfer". This issue must be resolved on a case-by-case basis. However, the following principles shall be applied in determining whether the prerequisite of actual knowledge or reasonable cause to know exists in a particular case.

9-111.501 At the Time of the Transfer

For purposes of these guidelines, a transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others. For example, if an asset is transferred to an attorney to be held in trust for the defendant, with the understanding that the attorney shall be entitled to a portion of the asset for legal services rendered, the time of the transfer will be the time at which the attorney renders the services and becomes entitled to the asset. If he has the requisite knowledge at that time, the asset may be subject to forfeiture.

9-111.510 Actual Knowledge Of Forfeitability.

For purposes of these guidelines, actual knowledge refers not simply to knowledge that some of a client's assets are either subject to forfeiture or from criminal misconduct. Rather, an attorney must have actual knowledge that the particular asset he received was subject to forfeiture. The guidelines require that there be reasonable grounds to believe that actual knowledge exists.

Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was known to the attorney at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct. (See Section 9-111.530, infra.)

9-111.511 Knowledge That The Government Has Asserted That A Particular Asset Is Subject To Forfeiture

Generally an attorney will have actual knowledge that the government has asserted a claim that an asset is subject to forfeiture based upon some proceedings instituted by the government. Normally the government will do this by initiating civil forfeiture proceedings against the asset, or by applying for pre-indictment or pre-conviction restraining orders under 18 U.S.C. 1963 or 21 U.S.C. 853, or by obtaining an indictment containing a forfeiture count.

A civil forfeiture proceeding, if known to an attorney, will establish actual knowledge of the forfeitability of any assets which are the subject of the proceeding since such assets must be specifically identified in the complaint. [8/] For the same reason an attorney has actual knowledge of the forfeitability of any asset which he knows is subject to a restraining order based upon a forfeiture allegation in a criminal proceeding. However, when the government asserts a claim only by including a forfeiture count in an indictment and no assets have been restrained, the return of the indictment by itself will not necessarily establish actual knowledge that a particular asset is forfeitable. It will depend upon how specifically the asset is described in the forfeiture allegation.

There are essentially three means by which an indictment can describe property that is alleged to be subject to forfeiture. It may specifically describe the property, such as "ten shares of stock in XYZ Corp. certificate nos. 1-10, purchased on January 1, 1985" or "account 12345 at First National Bank, Downtown Branch in the name of the defendant." It can set forth a generic description of certain property by amount and/or type, such as "ten shares of stock in XYZ Corp." or simply "$200,000." Finally, it can allege a broad all-inclusive description of property subject to forfeiture by incorporating statutory language, such as "any and all proceeds or profits of the criminal enterprise."

If property is specifically described, an attorney undoubtedly has actual knowledge of its forfeitability if he is aware of the contents of the indictment. However, if property is included in the forfeiture count only under a generic description or by the inclusion of the all-inclusive statutory language, an attorney does not have actual knowledge based on that fact alone that any particular asset is forfeitable. Instead, reasonable grounds to believe that an attorney has actual knowledge that the asset is subject to forfeiture would have to be based on evidence that the attorney knew the asset in fact was from criminal misconduct. Of course, the fact that an all-inclusive forfeiture allegation or a generic description was included in the indictment would be relevant evidence to establish such knowledge. (See Section 9-111.512, *infra*.)

8/ This is because in a civil forfeiture proceeding the *res* is the defendant and it must be sufficiently identified to allow seizure. A defendant, in most cases, will not be able to transfer an asset which is the subject of a civil forfeiture action to an attorney because the asset is actually seized as soon as the proceeding is instituted. However, in the rare case where a transfer takes place after the suit is initiated but before the seizure occurs, an attorney who has knowledge of the civil forfeiture action has actual knowledge that the particular asset is subject to forfeiture.

9-111.512 Knowledge That The Asset In Fact Is From Criminal Misconduct.

Regardless of whether any criminal or civil proceedings have been instituted or whether a forfeiture count specifically describes an asset, an attorney may have actual knowledge that an asset in fact is from criminal misconduct. Evidence that the attorney learned from the client or another involved in the criminal activity that the asset was from an illegitimate source would be compelling proof of the attorney's knowledge. Except when the use of such communications involves compelled disclosure of a confidential communications made during the course of representation, such communications may be relied upon to establish actual knowledge that the asset came from criminal misconduct. (See Section 9-111.430, supra.) For example, a client's testimony at trial or voluntary disclosure of his communications with his attorney may be relied upon to establish actual knowledge. (See Section 9-111.610 infra.)

While generic or all-inclusive descriptions of property alleged to be forfeitable by themselves do not establish actual knowledge that a particular asset has been alleged to be forfeitable, such descriptions are probative and relevant evidence to prove that an attorney had actual knowledge that an asset was from criminal misconduct. Also relevant is evidence of the method and manner of payment and the attorney's knowledge of the client's means of livelihood, so long as it is based on information other than compelled disclosure of confidential communications during the course of the representation. (See Section 9-111.610 infra.) Additionally, the presence or absence of an order restraining assets is relevant.

The existence of actual knowledge that an asset is from criminal misconduct will have to be determined on a case-by-case basis, taking into consideration all of the relevant evidence. For example, if an indictment alleges that "all profits and proceeds, including $200,000" are subject to forfeiture and $200,000 has been restrained, there would have to be other evidence of an attorney's knowledge of the source of his fee to prove that he had actual knowledge that other cash he received is from the criminal misconduct. [9/] On the other hand, if there were no order restraining a sufficient amount of cash and the fee was paid in cash, circumstantial evidence may establish that the attorney had actual knowledge that the fee was paid from the proceeds of criminal misconduct. For example, actual knowledge might be established if a forfeiture count was based on a drug felony charge, the fee was paid in a manner suggesting that it was the proceeds of drug trafficking and there was evidence -- other than from confidential communications -- that the attorney knew the client had no legitimate source of income. This latter evidence might exist where a pauper's petition was filed by the attorney for the client in other proceedings, and the client had not been gainfully employed since that time.

9-111.520 Reasonable Cause To Know That An Asset Is Subject To Forfeiture

---

9/ In any event, if the government sought to forfeit a fee in such a case without direct evidence of the attorney's knowledge, the attorney could probably obtain equitable relief. He may be able to rely on the fact that sufficient cash was restrained to establish that he reasonably was without cause to believe that other cash is not subject to forfeiture.

"Reasonable cause to know that an asset is subject to forfeiture" means that there is information known to an attorney which if known to a reasonably prudent person would cause such person to believe that the asset is forfeitable. [10/] Just as with actual knowledge, the starting point for deciding if an attorney has reasonable cause is an examination of the evidence of the attorney's knowledge of any legal proceedings instituted by the government for forfeiture of assets.

If civil proceedings have been instituted by the government to forfeit a particular asset or if a particular asset has been restrained, as discussed above, an attorney who has knowledge of the proceedings has actual knowledge of forfeitability. (See Section 9-111.511.) The same is true if the asset is specifically described in an indictment and the attorney knows the contents of the indictment. In these situations, any requirement under these guidelines that there be reasonable cause to know that an asset is forfeitable is met.

In other situations, all of the facts known to the attorney will have to be considered. The quantum of evidence required to establish reasonable cause to know will be substantially less than that needed to establish actual knowledge. However, the mere fact that an indictment alleges that "all profits or proceeds of the criminal activity" are subject to forfeiture will not meet the level of proof required to demonstrate reason to know. Similarly, forfeiture allegations which describe assets generically are sufficient to put an attorney notice that any assets of the type described potentially are subject to forfeiture, but they are not sufficient by themselves to establish reasonable cause to know. An attorney who accepts any such assets acts at his peril, and circumstantial evidence may establish that there was reasonable cause to know. Perhaps the only fact that prima facie would negate reasonable cause is the presence of a restraining order. For example, if an indictment alleges that $200,000 is subject to forfeiture, the existence of a restraining order applying to that same amount of cash could negate reasonable cause to believe that other money is forfeitable. (See note 9, supra.)

9-111.530 Policy Concerning Issuance Of Notification Letters To Attorneys

There may be cases where there are reasonable grounds to believe that all of a defendant's assets are subject to forfeiture. Under these guidelines, however, the only assets which an attorney conclusively would be held to have actual knowledge of forfeitability are those specifically named in the indictment or subject to a restraining order or civil forfeiture proceeding. There would have to be some evidence in addition to the forfeiture allegations to establish actual knowledge of the forfeitability of those assets which are not specifically described or subject to restraint. (See Section 9-111.510, supra.) As a result, it may be extremely difficult in cases where all of a defendant's illegitimate assets have not been discovered to prove actual knowledge, even though there are

---

10/ The standards set forth herein concerning proof of reasonable cause to know express no opinion concerning the Department's position as to what proof constitutes that a third party was "reasonably without cause to believe that the property was subject to forfeiture." Rather, the standards herein apply only to the Department's policy of not seeking forfeiture in certain cases unless there is evidence that an attorney had reasonable cause to know. (See Section 9-111.420.)

grounds to believe no legitimate assets exist. Although this may limit the cases in which actual knowledge may be established, the Department believes it is inappropriate to give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines.

Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice. The argument could be made that if the notice is not based upon a probable cause determination that the assets are subject to forfeiture, it was sent only to harass the attorney or cause him to abandon the case and not because the asset legitimately is subject to forfeiture. Thus, the government may be sidetracked into prolonged litigation which is only ancillary to the criminal charges. Additionally, if there is probable cause that a particular asset or all of a defendants assets are forfeitable, the written notice is unnecessary. The assets which are known to the government at the time of indictment can be specifically described in the forfeiture count. 11/ Additional assets discovered after return of the indictment can be included in a superseding indictment or can be subjected to a restraining order by making an appropriate showing to the court. Therefore, actual knowledge will be established by the restraining order or the specific description in the indictment. 12/

Another reason cautioning against written notice is that if it is not routinely and uniformly given, it will be argued that the government is targeting certain attorneys and attempting to prevent them from representing criminal defendants in certain cases. The Department does not have or endorse such a policy and believes it is unwise to create even an appearance that such a policy exists.

The limitation herein does not apply to written notice of the government's intent to seek forfeiture of an asset when it has been concluded that an attorney has actual knowledge -- based on facts and information other than that contained in the written notice -- that the asset is subject to forfeiture. However, where the criminal case giving rise to the forfeiture has not been concluded, such notice should be given only in extraordinary cases and may not be given without the approval of the Assistant Attorney General, Criminal Division.

11/ Including the assets in the indictment would not only have the benefit of establishing knowledge, but also would allow a restraining order to be obtained without a further showing.

12/ Perhaps the only situation in which some forfeitable assets would not be covered in this manner is when there is evidence that all assets belonging to a defendant are from criminal activity, but the government has not been able to locate all of them. In such cases, if there is probable cause to establish that all of the defendant's assets acquired after a particular date were from the criminal misconduct, the evidence could be presented to the grand jury and an allegation to that effect could be included in the forfeiture count. This allegation would be relevant and probative to prove that an attorney had actual knowledge that an asset he received was forfeitable. (See Section 9-111.510, supra.) Actual knowledge could be established by evidence, from sources other than confidential communications, that the attorney knew the asset he received was obtained by the defendant after the date alleged in the indictment.

9-111.600 Discovery Of Information Concerning An Asset Transferred To An Attorney As Fees For Legal Services.

Proceedings to forfeit an asset transferred to an attorney may be instituted only after the requirements of these guidelines and the approval of the Assistant Attorney General, Criminal Division have been obtained. Of course, this requires that a certain amount of information concerning the transfer of the asset be known. The discovery of information concerning the payment of a fee may be carried out as set forth herein.

9-111.610 Compelled Disclosure of Confidential Communications During the Course of the Representation.

As set forth above, actual knowledge of the forfeitability of an asset, cannot be established by compelled disclosure of confidential communications made during the course of the representation. (See Section 9-111.430, supra.) This limitation upon compelled disclosure of confidential communications does not preclude the use of these confidential communications when they are voluntarily disclosed. For example, the testimony of the defendant at trial may be relied upon. This limitation also does not preclude the use of a subpoena to obtain non-privileged fee information, such as the amount, source and method of payment. (See Section 9-111.620, infra.) But the subpoena may not seek to obtain any confidential communications.

This limitation on compelled disclosures does not recognize or imply that all confidential communications between a client and an attorney are protected either by that attorney-client privilege or the constitutional right to counsel. Only those confidential communications which meet all the requirements for privilege or which relate to defense preparation are protected. See, e.g., United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); United States v. King, 536 F. Supp. 253, 264-65 (C.D. Cal. 1982). The Department imposes this limitation in recognition of the fact that the need for clients to make full and free disclosure to their attorneys outweighs the detriment of placing limitation on the use of some non-privileged communications in certain limited situations.

9-111.620 Subpoenas Issued To Attorneys To Obtain Fee Information.

The Department requires that any grand jury or trial subpoenas to an attorney for information relating to the representation of a client must be authorized by the Assistant Attorney General, Criminal Division. (See USAM §9-2.161(a).) Information concerning the amount, source and method of payment of a fee paid to an attorney is information "concerning the representation of a client." Consequently, before a subpoena may be issued for such information, each of the requirements of that policy must be met. Most of these requirements should be easily met when issuing a subpoena to an attorney for fee information.

The requirements that the information be non-privileged and relevant can be satisfied when the subpoena calls for fee information. Generally, courts have held that fee information is not privileged. See, e.g., In re Shargel, 742 F.2d 61 (2d Cir. 1984); In re Ousterhoudt, 722 F.2d 591 (9thCir. 1985); In re Special Grand Jury (Harvey), 676 F.2d 1005 (4th Cir.) vacated and withdrawn, 697 F.2d 112 (1982) (en banc). In re Grand Jury Subpoena (Slaughter), 694 F.2d 1258 (11th Cir. 1982); In re Grand

Jury Proceedings, (United States v. Jones, 517 F.2d 666 (5th Cir. 1975); In re Grand Jury Investigation, 631 F.2d 17 (3d Cir. 1980) cert. denied, 449 U.S. 1083 (1981); United States v. Strahl, 590 F.2d 10 (1st Cir. 1978, cert. denied, 440 U.S. 918 (1979); United States v. Haddad, 527 F.2d 537 (6th Cir. 1975) cert. denied, 425 U.S. 974 (1976). They also have recognized that fee information may be relevant to a criminal case or investigation. It may prove unexplained wealth which is relevant to show that a defendant obtained substantial income from his illegal activities. It may show that the fee for one or more alleged conspirators was paid by another co-conspirator which is relevant to prove "association in fact" or may lead to the discovery of other co-conspirators. Finally, it may show the disposition of forfeitable assets or lead to the discovery of forfeitable assets which have been hidden by a defendant. The requirement that reasonable attempts to obtain the information from alternative sources must be exhausted will have to be considered on the facts of each case, but it should pose no special problem. The remaining two requirements, however, do involve some special considerations.

The requirement that there be "reasonable grounds to believe . . . that the information sought is reasonably needed" is straight-forward when the fee information is sought to prove association in fact or unexplained income. But where the purpose of a subpoena is solely or principally to obtain evidence relevant to a forfeiture count, this requirement translates into reasonable grounds to believe that the fee information is evidence of or will lead to evidence either of the disposition of forfeitable assets or the existence of hidden assets. This means that there must be a basis to conclude that there are assets subject to forfeiture which have not been identified or located. This may exist, for example, if there is evidence that a defendant either had no legitimate income or derived all his income from an illegitimate source at the time the fee was paid. It may also exist if there is evidence that a defendant derived a certain and substantial amount of income from his illegal activity, the disposition or whereabouts of which are unknown, and he had no substantial legitimate income at the time the fee was paid.

The final requirement is that the need for the information must outweigh the potential adverse effects on the attorney-client relationship. If the fee information is sought solely or principally to obtain evidence concerning a forfeiture count, the availability of post-judgment discovery may mean that the need to subpoena the information, particularly at trial, does not outweigh the potential for disqualification. (See Section 9-111.630, infra.)

9-111.630 Post-Judgment Discovery Proceedings Under 18 U.S.C. 1963 and 21 U.S.C. 853

Both the RICO and drug felony forfeiture statutes provide that the court may order that depositions be taken or that records be produced after an order of forfeiture is entered in order to identify and locate property declared forfeited. See 18 U.S.C. §1963(l); 21 U.S.C. §853(m). Consequently, if an order of forfeiture is entered covering property which is described generically or by incorporation of the statutory language, the government may make application to the court to obtain records, documents or testimony concerning the identity and location of that property. When an application is made for the deposition of an attorney or the production of records by an attorney concerning the transfer of assets for legal services, the

requirement set forth in 9-111.620 that there be reasonable grounds to believe that the fee information will be evidence either of the disposition of forfeited assets or lead to the discovery of forfeited assets shall apply.

It should be noted that since these statutory proceedings will occur after trial, the likelihood for any adverse impact upon the attorney-client relationship will be diminished substantially. In particular, the potential for disqualification of the attorney from representation of the client because of the need to testify at trial should not arise. Therefore, when fee information is sought solely for purposes of forfeiture and it is feasible, the discovery of such information should be deferred to the post-trial proceedings rather than proceeding by way of grand jury or trial subpoena.

9-111.700 Agreements To Exempt From Forfeiture An Asset Transferred To An Attorney As Fees For Legal Services.

Agreements may be entered into to exempt from forfeiture an asset transferred to an attorney as fees for legal services, but only with the prior approval of the Assistant Attorney General, Criminal Division. (See Section 9-111.300, supra.) Agreements may be approved only if: (1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.

Efforts should be made to assist in identifying the assets, if any, belonging to a defendant which are not subject to forfeiture. In this regard, any proffer of evidence by an attorney as to the source of the assets may be relied upon. However, an agreement to exempt fees based on such a proffer must contain an express condition that the agreement is not binding if full and accurate disclosure has not been made or if the proffer is false or misleading.

In determining whether an asset is being transferred in payment of a legitimate fee, the amount of the fee may be taken into consideration. However, the focus should not be on whether the fee is reasonable. The focus must be on whether it is a legitimate transaction or a sham transaction designed to shield assets from forfeiture. If the transaction is legitimate, the fee, even if it appears exorbitant, may be exempted if it is paid from a source that meets the first requirement. Conversely, a fee, even if reasonable, may not be exempted from forfeiture by agreement if the first requirement is not met. Any agreement to exempt a fee from forfeiture, however, may be limited to specific amount if there is basis to believe that only assets in that amount are not subject to forfeiture.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

[illegible]

The Honorable Joseph R. Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

This responds to your letter to Assistant Attorney General Stephen S. Trott of May 28, 1986, concerning forfeiture of attorney's fees.

Question 1: Isn't the Department's position that the forfeiture is constitutional dependent on the assumption that appointed counsel will be available to defendants whose assets are all subject to forfeiture?

Yes, but not in all cases. Appointed counsel must be made available only when a forfeiture count is so broad and all-encompassing that a defendant does not have sufficient assets from from forfeiture alternatives to hire an attorney. Otherwise, the defendant may be denied his or her court-appointed right to counsel. However, where a defendant has sufficient assets from from forfeiture with which to hire an attorney, forfeiture of a fee paid with tainted assets is constitutional, regardless of the availability of appointed counsel. In such cases, the defendant will not be deprived of the right to counsel because he or she can hire an attorney with the legitimate assets.

Question 2: Realistically, how often can counsel appointed under the Criminal Justice Act afford to take on large-scale RICO and CCE cases?

The ability of a particular attorney to accept appointment under the Criminal Justice Act (CJA) is a RICO or CCE case, and the frequency with which he or she can accept such an appointment, depends upon a number of factors: the size of the firm, if any, with which the attorney is associated; the nature of the attorney's practice; the number of other cases in which the attorney is appointed under CJA; and the complexity of the particular case. It is therefore extremely difficult to answer your question in the abstract.

We can point out, however, that so far as the financial impact of appointment is concerned, CJA provides compensation which is fair and commensurate with the time and costs expended by an attorney in a RICO or CCE case. Notwithstanding the usual limits on CJA payments, an attorney may be paid for an unlimited number of hours that are actually devoted to representing a defendant of the representation in "extended or complex." The only requirements are that the trial court must certify that the payment is necessary to ensure fair compensation, and the chief judge of the current court approve the payment. 18 U.S.C. Appendix IV. An attorney also can be reimbursed in any case, regardless of the complexity, for any expenses which are reasonably incurred. 18 U.S.C. Appendix IV. [illegible] Jones, [illegible] F. Supp. [illegible] M.D. Tex. [illegible] [illegible]

authorize expenditures to obtain "investigative, expert, or other services necessary for an adequate defense." 18 U.S.C. 3006A(e)(1). The fact that a case is particularly complex by itself may justify funds to hire an investigator. See United States v. Gaerter, 432 F. Supp. 805 (E.D. Wisc. 1977). Finally, a court may appoint two attorneys in an appropriate case. See, e.g., United States v. Kasto, 584 F.2d 268, 273 (8th Cir. 1978); United States v. Aadal, 280 F. Supp. 866 (S.D.N.Y. 1967). This can help to diffuse the economic impact of appointment in complex cases, as well as the impact upon an attorney's time.

We recognize that an attorney compensated under the Criminal Justice Act may not receive the same amount as an attorney who is privately retained. But the focus should not be upon whether an attorney will be paid an amount under CJA equal to what he or she regularly charges. Instead, it should be upon whether CJA can insure that a defendant in a CCE or RICO case who is unable to hire an attorney will receive adequate representation. Given the amounts that can be paid for attorney hours, for reasonable expenses and for investigative assistance, we believe CJA can fulfill this purpose.

Question 3: Can the public defenders offices realistically be expected to handle such cases? Won't they overburden the public defenders? Won't there be a problem in cases with multiple defendants, whose differing defenses may raise conflicts of interest?

We have no doubt that public defenders have sufficient talent, ability and experience to handle large-scale RICO and CCE cases. There are numerous cases in which public defenders have been appointed to represent defendants in complex conspiracy cases and sophisticated espionage cases that are every bit as difficult as CCE and RICO cases. The public defenders have provided adequate and commendable representation in such cases.

In terms of the burden on the public defenders, we do not believe that the number of cases in which public defenders — or CJA attorneys — will need to be appointed will be substantial. First of all, if a defendant has some legitimate livelihood, he or she should be able to satisfy an attorney that there is no real risk of forfeiture by paying the fee from legitimate income. If the defendant cannot convince the attorney that there is an acceptable source of funds, the defendant may be able to shift any risk of forfeiture to someone else who is willing to assume it. For example, in any number of cases involving defendants who are not personally able to hire attorneys or to post bail, family members and friends will often make arrangements or assist in obtaining private attorneys or posting bail. The same may very well occur in CCE and RICO cases involving forfeiture allegations.

Where public defenders are needed to represent defendants in complex RICO and CCE cases, the financial resources of the public defender could be supplemented if necessary to help alleviate any potential over-burdening. This supplement can come from assets which are forfeited, if the defendant is convicted and forfeiture is ordered, or by ordering contribution from the defendant, if the defendant is acquitted and/or a forfeiture judgment is not obtained. Providing additional resources to the public defender in this manner will insure sufficient funding for public defenders without any negative financial impact on the government.

It is true that if there is a conflict of interests between two defendants, the public defender may not be able to represent both defendants. However, alternate counsel can be appointed under CJA to represent one of the defendants. As just discussed, sufficient economic remuneration is provided by CJA to insure adequate representation. We also think it would be appropriate in cases where appointment is made under CJA and where forfeiture has been ordered, to pay the amounts authorized by CJA from the forfeited assets. This would insure that no supplemental appropriations from other government sources would be needed to replenish CJA funds.

Question 4: A recent study by Professor William Genego (referred to in testimony at the hearing) suggests that the Department's aggressive approach to fee forfeiture is causing experienced defense counsel to decline representation in a significant number of cases. Don't you think Department policy should be modified to avoid the criticism that the Department is causing the exodus of private competent counsel?

We do not have any statistical information either to confirm or to dispute the underlying information upon which Professor Genego based his conclusion. However, Professor Genego himself has indicated that the data may be biased. He has reported that the survey he conducted received a response rate of 42 percent, and noted that "[t]he likelihood that an attorney would respond to the questionnaire was probably greater if he or she had been the subject of one or more of the [governmental] practices examined." Genego Risky Business: The Hazards of Being a Criminal Defense Lawyer, 1 Criminal Justice 2, 5 (Spring, 1986). (A copy is enclosed for your convenience.)

Aside from questions concerning the accuracy of the data, we also have doubts about the validity of the conclusion that the data indicates the potential for fee forfeiture is causing an "exodus of private competent counsel." Professor Genego's survey indicates only that 14 percent of the attorneys surveyed, or a total of 230, "refused to handle at least one criminal case." Id. at 39 (emphasis added). Of these 230 attorneys, only 16 had decided to terminate federal criminal practices completely and 29 simply had "decided to take fewer criminal cases." Id. Thus, it appears that the majority of those who responded that they had refused a criminal case, had in fact refused only one case. Moreover, the figures were for a period of over three years. Id. at 40. We do not believe that this supports a conclusion that competent defense counsel are abandoning clients accused of certain offenses.

The data also does not support any correlation between the potential for fee forfeiture and the decision to decline taking on a criminal case. Professor Genego reports only that 21 percent of the attorneys surveyed, or a total of 348, had their "fee questioned" by the government. Id. at 4. Nothing indicates that the attorneys who declined to take on a federal criminal case were those who also reported having a "fee questioned." Furthermore, the question asked in the survey was broadly worded to inquire if "the government challenged or questioned the legitimacy of the money ... received" as well as whether the government "attempted to prevent the defendant from using his or her assets to pay your fee." Id. at 42. Since, as discussed below, fee forfeiture has been authorized in six cases, only one of which involved a fee paid in a federal criminal case, the responses must relate principally to situations where a "question" concerning the fee was raised or a restraining order was sought and not where action was actually taken to forfeit a fee. Therefore, any reluctance to represent CCE and RICO defendants cannot be correlated to what has actually transpired with respect to fee forfeiture, but only to unfounded fears.

Finally, we take issue with the suggestion that the Department's approach to fee forfeiture is "aggressive." Our policy is narrowly drawn and takes a very conservative approach. First of all, it implements a knowledge standard for attorneys that is substantially different than that used for any other person. An attorney representing a client in a criminal case stands to lose his or her fee only if he or she actually knows that the fee was paid with illegitimate assets. This means that there must be evidence that the attorney knew the particular money or property received either specifically had been alleged to be subject to forfeiture or in fact came from criminal misconduct. Moreover, we have placed significant limitations upon the evidence that we will consider in determining if an attorney has the requisite knowledge. Neither a letter to an attorney stating that the government believes that the client has no legitimate assets nor any compelled disclosure of communications between the attorney and the client may be relied upon to prove that the attorney knew the fee was paid with forfeitable assets.

These policy limitations together with the statutory provisions affording relief to innocent third parties provide realistic guidance to attorneys concerning steps that can be taken to protect against forfeiture. Where a forfeiture count has been included in criminal charges against a client, an attorney can accept a fee without any inquiry if he or she determines there truly is no cause to believe that the fee is paid with tainted assets. If on the other hand, the fee is paid under circumstances which would reasonably cause any other person to believe that the money or property involved is subject to forfeiture, the attorney should inquire as to the source of the fee. If the client provides reasonable and credible assurances that the fee is actually from a legitimate source, the fee should be immune from forfeiture both because the predicates for forfeiture under our policy cannot be met and because the attorney can meet his or her burden to obtain equitable relief under 18 U.S.C. 1963(m)(6) or 21 U.S.C. 853(n)(6). Additionally, if an attorney inquires as to the source of the fee and makes a proffer demonstrating that the fee is from a legitimate source, the United States Attorney can enter into an agreement to exempt the fee from forfeiture. See 9-111.700. Moreover, our attorneys have been directed to assist defense attorneys in identifying sources of legitimate assets.

In summary, forfeiture is a risk only if the relevant facts — including such things as the language of the forfeiture count, the mode and manner of payment and the client's apparent source of livelihood or lack thereof — reasonably indicate that the fee is from a tainted source and the attorney fails to take any action to determine the source of the fee and there is evidence available to the government, other than compelled disclosures of confidential communications, that the attorney actually knew the fee was being paid from forfeitable assets. In view of these limitations, there is no reason for an attorney who acts in good faith to refrain from representing a CCE or RICO defendant if the attorney actually and reasonably believes — even if mistakenly — that the client is paying the fee with legitimate assets. We therefore see no need to modify our policy and place further limits upon fee forfeiture.

Question 5: Isn't it true, as a practical matter, that the addition of a forfeiture count to an indictment may force the disqualification of chosen defense counsel? In defending the forfeiture charge, isn't it entirely foreseeable that defense counsel may be called to testify at trial in a manner that may conflict with the interests of his client?

The answer to both of these questions is no. A forfeiture count normally only identifies the property that the defendant obtained from the criminal misconduct and usually does not indicate that the property has been transferred to or is held by a third party. This is particularly true when the property is paid to an attorney for representing the defendant since such a transfer most often occurs after the initiation of charges and therefore is unknown to the grand jury at the time an indictment is returned. Consequently, the issue at trial is limited to whether the property described in the forfeiture count was generated by the offense, and not what subsequently happened to it. An attorney's testimony would not be relevant to this issue since he or she normally will have admissible testimony only about the circumstances of his or her receipt of the property and not about how the defendant obtained it. Thus, he or she will not be called as a witness against the defendant.

The only time at which an attorney might have to testify is after conviction and only if a forfeiture verdict is returned affecting property transferred to the attorney. The forfeiture statutes require that if property has been ordered forfeited, notice must be given by the United States of its intent to dispose of the property. After this notice is given, any person other than the defendant may petition the court if such person believes he or she is entitled to the property. See 18 U.S.C. 1963(m)(1) & (2); 21 U.S.C. 853(n)(1) & (2). This is the procedure that an attorney who was paid with

property ordered forfeited would follow to assert a claim that he or she is entitled to equitable relief. The attorney might have to testify at a hearing on the petition because the burden would be on the attorney to prove that he or she was without cause to believe the property was subject to forfeiture. But since the defendant is not a party to this proceeding and his or her interest in the property is not at issue, the presentation of testimony by the attorney would not involve any conflict or lead to disqualification.

Question 6: The Department's guidelines on attorney subpoenas (section 9-111.610) attempt to draw a distinction between information that an attorney may have as a result of confidential communications with his client and information obtained from any other source. As a practical matter, isn't that distinction almost an impossible line to draw?

No, it is not difficult as a practical matter to determine if an attorney's knowledge that a fee was paid with forfeitable assets is based upon confidential communications from the client or whether such knowledge is based upon information from some other source.

Items of information which are derived from a source other than the client, such as the language of a forfeiture count and communications between the attorney and a third party, are clearly not confidential communications. In many situations this type of information will establish an attorney's knowledge of the forfeitability of an asset. For example, if a forfeiture count alleges that a particularly described house is subject to forfeiture and the attorney accepts that house or an interest in it as payment of the fee, the indictment itself will establish the attorney's knowledge if the transfer occurred after indictment and there is evidence that the attorney was aware of the contents of the indictment. (This is true, however, only with respect to assets which are specifically described in the indictment and not with respect to those which are described generically. This point is further discussed in our guidelines at 9-111.511.) Similarly, if there is evidence that a third party who delivered the fee to the attorney told him or her that the money actually came from the criminal misconduct, the statement of the third party would establish the attorney's knowledge.

In some situations, particularly where the forfeiture count does not specifically identify the items of property that are subject to forfeiture, it will be necessary to consider other information about the client or the property received which may be known to the attorney. The attorney's knowledge of the mode and manner of payment and of the client's sources of income would be especially relevant. The issue will be whether this information is known to the attorney because of a confidential communication from the client. This, however, is not difficult to determine. A "confidential communication" is a communication between a client and an attorney that is made in a manner indicating that it is intended to be confidential and made under circumstances where it is reasonable for them to believe that the communication will be confidential. In applying this standard, we can draw upon a large body of case-law concerning the attorney-client privilege since a prerequisite to that privilege is that the communication be made in confidence. For example, if information is conveyed to the attorney without the presence of any other person it would be a confidential communication. However, if someone else is present or the information is conveyed for purposes of having the attorney reveal that information to a third party, there is no confidential communication. In practical terms, we can comply with our policy by not subpoenaing or deposing the attorney or the defendant for purposes of asking either of them what was communicated solely between the two of them about the source of the fee.

Question 7: In light of all the constitutional and ethical issues that have been raised, wouldn't it be sensible for the Department to consider further

> curtailment in its Guidelines on the use of forfeiture against assets paid as attorneys' fees?

As discussed in our answer to Question 1, we do not believe that there is any unresolvable constitutional issue raised by fee forfeiture so long as appointed counsel is made available to defendants who are unable to hire an attorney because of forfeiture allegations.

We also do not believe that there are any real ethical problems raised by fee forfeiture. The principal ethical obligation of an attorney is to act in the best interest of the client at all times. To this end, an attorney is prohibited at the outset from commencing representation of a client if he or she believes a conflict may exist between the client's interest and the attorney's self-interest. Rule 1.7 of the Model Rules of Professional Conduct of the American Bar Association provides in subpart (b) that a lawyer

> "shall not represent a client if representation of that client may be materially limited by the ... lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected: and (2) the client consents after consultation."

Obviously, this precludes an attorney from undertaking representation of a client if the attorney's interest in preserving his or her fee is so substantial that the attorney does not reasonably believe the representation will be unaffected by the attorney's desire to protect his or her economic interest. But it certainly presents no intractable ethical dilemma.

The argument that a proposed plea bargain may create a conflict is similarly without substance. The canons of the Model Rules provide that the attorney's first duty is one of undivided loyalty to the client. Thus, if there is a conflict between the attorney's self interest in preserving the fee and the client's interest in accepting a disposition of the criminal case that may lead to forfeiture of the fee, the attorney is duty bound to act in the best interest of the client. To do otherwise unquestionably would be a breach of ethics.

A primary reason why there is no real ethical problem presented when there is a conflict between the client's best interest and the attorney's self-interest is that the attorney has no ethical obligation to preserve his or her fee. Thus, the situation is entirely different from one involving a conflict of interests between two clients. When an attorney represents two clients, an equal duty of undivided loyalty is owed to each client, and the attorney may not favor the interest of one client over the other. If there is a conflict, the attorney faces an unavoidable ethical dilemma and must withdraw from representation of one or both clients. However, when the client's best interest competes with the attorney's own personal economic interest, the conflict poses no ethical dilemma; the attorney's only obligation is to do what is best for the client.

The notion that the potential for fee forfeiture prevents an attorney from accepting a RICO or CCE case because of the ethical prohibition against contingency fees in criminal cases is also illusory. An attorney who accepts payment of a fee from assets which he or she is without cause to believe are subject to forfeiture will be entitled to keep those assets even if the client is convicted and it is proven that the assets in fact are illicit. This is because the attorney will qualify for equitable relief. Thus, since the attorney is not contracting to be paid only if he or she is successful in defending the client, there is no violation of ethics.

The only situation in which an attorney conceivably could violate the ethical prohibition against contingency fees is when the attorney <u>knows</u> that the fee in fact is paid with forfeitable assets. In such situations, the attorney's state of mind would preclude equitable relief and if there was an agreement that the client was relieved of any obligation to pay from other

assets, the attorney would be contracting to be paid only if he or she was successful in defending the client. Such arrangements should be considered unethical, and so long as compensation under CJA is made available or public defenders can be appointed, the right to counsel can be protected without condoning these obviously undesirable fee arrangements.

Question 8: Would you list for me the cases in which forfeiture of attorneys fees has been sought and indicate for each case whether the government was successful on the forfeiture count?

Authorization to forfeit a fee has been granted in a total of only six cases since the time we began requiring the prior approval of the Assistant Attorney General. Some of these authorizations concern forfeiture proceedings that were initiated prior to the time that approval of the Assistant Attorney General was required. The United States Attorneys, however, obtained approval to continue contesting claims by attorneys that they were entitled to the assets that were the subjects of the proceedings. All of these cases are currently pending.

Only one case involves assets which were actually transferred to an attorney. In United States v. Meredith, Cr. No. M-85-0541 (D.Md.), authorization has been granted to forfeit a fee paid for representation in a current criminal case. Our investigation revealed that the necessary factual predicates both under the statute and under our guidelines had been met. The attorney has been informed that steps may be taken to forfeit the fee in the event the client is convicted and a forfeiture judgement is obtained; however, no proceedings as yet have been instituted to encumber or forfeit the fee nor has it been included in the forfeiture count of the pending indictment. The district court in which the criminal charges are pending has granted a motion by the attorney to exclude from forfeiture any assets transferred to him by the client for representation in the criminal case. We are appealing the decision of the district court.

In the five remaining cases in which authorization has been granted to seek forfeiture of a fee, the assets have not actually been transferred to the attorneys. Instead, as noted above, the clients merely assigned their interests in assets which are the subjects of the forfeiture proceedings and the attorneys have filed third-party claims. The United States Attorneys have been authorized to contest the claims of the attorneys to these assets.

Four of these cases involve civil forfeiture proceedings instituted to forfeit currency seized by state or local authorities. The currencies that are the subjects of these proceedings were assigned to the attorneys for representation in state or local criminal proceedings after the currency had been seized. Federal forfeiture proceedings were instituted because of the unavailability of forfeiture in the state courts. In none of these cases has the currency actually been paid to the attorney, but at all times it has been in the possession of a law enforcement agency. These four cases are: United States v. $10,694.00, No. C-84-449-D (M.D.N.C.); United States v. $17,221.00 and Jewelry, 4-86-193-E (N.D. Tex.); United States v. $23,110.00, No. C-84-2605-RPA (N.D. Cal.); United States v. v. $45,510.00, No. C-85-20541-RPA (N.D.Cal.).

The fifth case involves a criminal forfeiture. In United States v. Shields, No. G-85-38 Cr. (W.D. Mich.), two defendants were convicted on RICO charges, and an order of forfeiture was entered concerning property identified in the forfeiture count of the indictment. Thereafter, the attorneys for the defendants filed third-party claims, alleging that a lien securing payment of their fees in the matter had been executed by the defendants on the forfeited property. Authorization was granted to contest the attorneys' claim to the property since the lien was executed after return of the indictment containing a forfeiture count particularly describing the property upon which the lien was executed.

Question 9: One proposal being discussed is an amendment to pending legislation that would allow payment of attorneys fees out of otherwise forfeitable assets at the compensation rates fixed under the Criminal Justice Act. As an alternative form of compromise, would the Department be willing to support a scheme in which the Court would be empowered to determine the proper amount of compensation from forfeitable assets on a case-by-case basis? If not, why?

We oppose a scheme that would allow a court to pay "a proper amount of compensation" at a rate other that fixed by CJA. As discussed above, the CJA payment structure is sufficiently flexible to insure fair compensation. If justified, payments can be made for a substantial number of hours at up to the maximum hourly rate, as well as for investigative assistance, and reimbursement can be made for reasonable expenses. It is true that payments at CJA rates will not guarantee payment of a fee equal to what the private market will pay. But this should not be the purpose for providing compensation from forfeited assets to attorneys who represent CCE and RICO defendants. Rather, the purpose should be to guarantee adequate representation. The rates provided under CJA embody a sound legislative decision concerning a rate of compensation that will accomplish this purpose, and any other statute which also seeks to provide adequate representation need not and should not employ different rates.

We are opposed to compensation at rates other than CJA rates also because it unjustifiably provides preferential treatment for CCE and RICO defendants and their attorneys. It must be remembered that the forfeited assets in a RICO or CCE case are no different than the proceeds of a bank robbery or the property that is taken by a defendant who commits a theft offense. This similarity is most apparent in RICO cases in which the predicate offense is theft, mail fraud or extortion. Therefore, the question must be asked: Is there any reason why CCE and RICO defendants should be allowed to use their crime proceeds to hire an attorney when other defendants whose crimes generate proceeds are not? The answer is no; allowing a drug dealer or racketeer to use drug or racketeering money to pay an attorney is as much an affront to notions of right and wrong as is allowing a bank robber or thief to use bank robbery proceeds or stolen property to pay an attorney.

Allowing payment at CJA rates from the forfeited assets in RICO and CCE is not inconsistent with this belief. We support a proposal to make to such payments only because forfeited assets belong to the government, and it is the government's prerogative to use them as it sees fits. If it is decided that these assets should be used to reimburse CJA funds or public defenders, then it makes sense in these times of budgetary restraint to avoid unneccessary administrative costs by allowing them to be paid directly to an appointed attorney. But this certainly does not recognize that RICO and CCE defendants have any greater right than do defendants charged with bank robbery or theft to use the proceeds of their crimes to hire an attorney.

Finally, an exemption for "reasonable fees" or "proper compensation" would create a method for defendants to evade substantially the impact of forfeiture. A defendant could pay an attorney with only forfeitable money or property, and an attorney would have no reason not to accept such payment. In the absence of an ability to forfeit substitute assets, a defendant could thereby reap the benefit of the ill-gotten gain by trading it for legal services and, at the same time, not dissipate or lose any legitimate assets.

We do not believe that guaranteeing adequate representation requires that such a substantial erosion of the impact of forfeiture must be tolerated in view of the realistic ability to insure representation of CCE and RICO defendants facing forfeiture by reimbursing public defenders and appointed attorneys at CJA rates.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

Enclosure

cc: The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

ADDITIONAL STATEMENT PREPARED BY
PHYLIS SKLOOT BAMBERGER
FOR THE
FEDERAL DEFENDER LEGISLATIVE SUBCOMMITTEE
ON BEHALF OF
THE FEDERAL PUBLIC DEFENDERS*

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING FORFEITURE OF ATTORNEY FEES

JUNE 19, 1986

*With thanks for the research and assistance of Steven Losch.

These remarks are in response to the statement of the Department of Justice made by Stephen S. Trott, Assistant Attorney General, Criminal Division concerning Attorney Fee Forfeiture (hereinafter "Trott Statement"). The Trott Statement supported the legitimacy of the forfeiture of attorney fees, like all third party forfeiture, on grounds (1) that forfeiture and relation-back as used in 18 U.S.C. §1963 and 21 U.S.C. §848 are traditional remedies, (2) that the ancillary hearing procedures of §1963(m) protect the attorney interest, and (3) that Sixth Amendment interests do not justify an attorney fee exemption from forfeiture.

1. The scope of forfeiture and application of the relation-back doctrine under the statutes is broader than that traditionally authorized.

The relation-back doctrine is codified in 18 U.S.C. §1963(c), and applies to all third parties. The single purpose given in the legislative history for application of the relation-back doctrine to forfeiture was to prevent attempts to transfer property to third persons for the purpose of avoiding forfeiture. S. Rep. No. 98-225 at 195- 196, 200 (98th Cong. 1st Sess. 1983). The Department of Justice in its presentation, although acknowledging the injury to third parties (Trott statement at 3), adopts the position that the relation-back doctrine is to be universally applied to all property and all people and asserts that it is unacceptable to exempt anyone,including lawyers, from its operation.

The Department of Justice's position is historically incorrect and, unfortunately, the legislative history of the statute reflects this error. There have been exceptions to the application of the relation-back doctrine without the need to prove bona fide purchase and lack of knowledge of the source of the property. Further, because the scope of forfeiture under §1963 is broader than traditional in rem forfeitures to which relation-back applied, the relation-back doctrine affects more

transfers than it did prior to the statute with a resulting greater impact on third parties. These consequences were not considered by the Congress and the legislative history does not speak to them.

The analysis of the government's position must note the difference between in rem forfeiture and in personam forfeiture. Under the English common law, until the 14th century, forfeiture was used to punish the individual and was in personam against a convicted person rather than in rem against the property itself. Real property was subject to the relation-back doctrine, although chattels and other possessions were not. Property held by a convicted person as corporate officer or jointly owned by the convicted person and spouse were not even subject to forfeiture. United States v. McManigal, 708 F.2d 276, 287 (7th Cir. 1983); Note, Bane of American Forfeiture Law-Banished at Last, 62 Cornell L. Rev. 768, 773 n.37 (1977).

A telescoped history of forfeiture in the United States shows that all property was not forfeited as a result of conviction, but that forfeiture of specific property was obtained by both in rem and in personam proceedings. The relevant statute determined if the relation-back doctrine applied. The development of in rem forfeiture, which derived from the feudal concept of deodand, ignored the innocence of the property owner, but was based on a limited view of the property subject to forfeiture: the property had to be "guilty," either because it was unlawfully used or because it was in some unlawful condition.*

The history shows that in rem forfeiture was applicable to limited property and that in personam forfeiture used a limited relation-back theory. In both instances, the interests of third parties were protected to a greater extent than they are under the current statues: in personam forfeiture left the personal

---

*For the history of this development see Note, Bane of America Forfeiture Law- Banished at Last, 62 Cornell L.Rev. at 779-792.

property with the third person; in rem forfeiture (after much debate) applied only to property which was itself "guilty." The present statute ignores this history and expands both the property forfeitable and the applicability of relation-back doctrine to all forfeitable property despite the impact on third persons.

The Department of Justice asserts that only instrumentalities and proceeds of drug and racketeering offenses are subject to forfeiture. However, this attempt to equate the scope of forfeitable property under §1963 with property traditionally forfeitable in in rem proceedings is not supported by language of §1963 which applies to more than merely "guilty" property. Section 1963(a) authorizes forfeiture of any interest, property, security, etc. in an enterprise in any way involved with a RICO or narcotics enterprise violation whether or not the specific property or interest itself was used in the violation. Courts have held that the in personam forfeiture under §1963 deprives:

> that defendant of all of the assets that allow him to maintain an interest in a RICO enterprise, regardless whether those assets are themselves 'tainted' by use in connection with the racketeering activity. Thus, in United States v. Hess, 691 F.2d 188, 190-91 (4th Cir. 1982), the Court held that the jury may not find that less than the full amount of the defendant's interest in an enterprise is subject to forfeiture because §1963 is mandatory. The Court concluded that the only issues for the jury are whether the defendant violated RICO and what interest the defendant held in the enterprise.

United States v. Cauble, 706 F.2d 1322, 1348-9 (5th Cir. 1983).* There is no support for the argument that the scope of forfeitable property under current law is like that in in rem forfeiture so that the application of the relation-back doctrine is merely in keeping with the usual use of that doctrine.

---

*The 1984 amendments to §1963 were intended to override court decisions which limited forfeitable property. See e.g. United States V. McManigal, 723 F.2d 580 (7th Cir. 1980); United States v. Zang, 703 F.2d 1186,1195 (10th Cir. 1982); United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980); United States v. L'Hoste, 609 F.2d 796, 809-10 (5th Cir. 1980).

The second argument in the Department of Justice rationale is that it is "immoral" for third parties, including attorneys, to take tainted property and therefore the relation-back doctrine is properly applied. In essence, the argument is that the third party should be punished by forfeiture of a defendant's tainted property. Prior to this statement is there no hint that punitive measures are to be taken against third parties by forfeiture. The punitive purpose of in personam forfeiture is against the defendant and in rem forfeiture is against the property. The early history of in personam forfeiture shows an effort to reduce the harshness against third persons by exempting from the relation-back doctrine personal property in all cases and certain types of property for forfeiture in other instances. Although the Department of Justice finds that people who take tainted property are "offensive" or "immoral," the use of forfeiture has not previously been viewed as appropriate to cure the "offensiveness" or "immorality." Other remedies may be available such as prosecution for fraud.

2. The Procedures of §1963(m) do not protect an attorney.

The Department of Justice argues that the procedures of §1963(m) protect the attorney by allowing the attorney, as well as any other third party, to prove he was a bona fide purchaser of the property and had no reason to know that the assets were tainted. However, §1963(m) cannot protect an attorney's interest.

The proceeding under §1963(m), called an ancillary hearing, is conducted after entry of a forfeiture order and notice of the order. A third party may petition the court for a hearing on his interest in the forfeited property. The claimant may present evidence and witnesses and cross-examine witnesses. The judge hearing the claim may consider relevant portions of the record in the criminal case against the defendant in determining whether the third party claim should prevail. The claimant has the

burden of establishing he was a [illegible] purchaser for value and had no reason to believe the property was subject to forfeiture.

The lawyer cannot use the anti-lawyer proceeding for general revenue. In order to carry his burden of proving that he had no reason to believe that the money he received for his services was tainted, an attorney would necessarily disclose confidential communications with his client, in violation of the attorney-client privilege. Unless other third parties are purchase or sell goods and services in a transaction with a RICO or CCE defendant, an attorney will know about charges or pre-trial investigation against a client. The nature of the investigation or the charges in an indictment at least inform the lawyer of the possibility that any fee is tainted. Finally, the lawyer must conduct an investigation of the case through his client and make an assessment of the client's culpability. This investigation will necessarily go to the heart of privileged matters. Ultimately, the lawyer who must have a trial of good faith lack of knowledge may satisfy so as only as the risk of administering investigations for factors to make a proper pre-trial investigation of his client's case.

A further conflict arises because the judge enjoining the client may use evidence concerning the property which was produced at the criminal trial. However, the best strategy for the defendant at trial may be to place reliance on the inability of the government to prove the defendant's guilt, and to introduce no evidence concerning particular property assumed to be fair forfeiture. To place the lawyer in a position of having to present his fee by placing into evidence information about the property when the best interest of his client would be to produce no evidence or other evidence or to place client and attorney at odds.

The Department of Justice assess that in recent lawyers differently from other students because under the prohibition it will seek forfeiture of attorney fees only for "[illegible]

grounds based on specific evidence to believe that the attorney had actual knowledge that the asset to be received was subject to forfeiture" (Trott Statement at 13). The Department of Justice states this is a higher standard than that in the statute. However, the Department of Justice position is misleading for under the statute the attorney has the burden of proving at the hearing that he no had reason to believe the property was forfeitable. The Department of Justice cannot change either the standard or burden of proof required by §1963(m). The Department of Justice can initially choose not to include particular items of property in the indictment, but at that stage in the proceeding the prosecutor has no way of knowing what property was or will be transferred to counsel. Even if the burden of proof could be modified by the Department of Justice or was changed by Congress, it would have no effect on the conflict of interest that is created by placing on the attorney the burden of showing the fee should not be forfeited.

The lawyer's inability to find protection in §1963(m) justifies an exemption for attorney fees. The Department of Justice view that it must treat all third party claimants identically for in personam forfeiture is not historically supported and, indeed, the lawyers receive less protection under the present scheme than other people because they are likely to be found to have a reasonable basis for believing property is tainted because of their function.

3. The Sixth Amendment justifies exemption of attorney fees from forfeiture

The Department of Justice treatment of the Sixth Amendment as not supporting exemption for attorney fees from forfeiture is not persuasive. As other papers have already explained, the fee forfeiture undermines the entire system of effective representation by counsel. This danger is sufficient to justify the limitation of forfeiture. The Department of Justice next argues

that choice of counsel, limited by forfeiture, is of no consequence (Trott Statement at 8-10). However, the choice to retain counsel means the ability of a client to have counsel prior to an indictment for purposes of protecting him during the government investigation and to conduct an early defense investigation and begin pre-trial preparation. Assigned counsel cannot become involved in such activity. This difference in preparation affects the ability of counsel to provide competent representation at trial and consequently implicates the Sixth Amendment as well as due process. Thus, the Department of Justice denigrates the choice of counsel concept without fully discussing its implications.

The Department of Justice also argues that the adverse effect of the forfeiture procedure is only that an attorney is warned of the forfeiture potential (Trott Statement at 10). However, the knowledge that a lawyer may put into a client's case several years of work without compensation discourages representation by retained counsel. The Department of Justice continues by asserting that the client need only assure his lawyer that the funds are from a safe source (Trott Statement at 10). However, the attorney's adequate pre-trial investigation may result in his discrediting such assurance. Or, the lawyer may understand that even if he believes his client to be innocent and truthful, the judge who conducts the ancillary hearing may discredit the asserted good faith belief of the lawyer. Indeed, the vulnerability of counsel is demonstrated by the acknowledgement of the Department of Justice that it is opposing the claims of attorneys for their fees.

The history of forfeiture and the relation-back doctrine shows that forfeiture has not been uniformly applied but rather that there has been reconciliation with competing interests. No interest can be stronger than the right to competent counsel in criminal cases and the circumstances justify an exemption for

counsel fees. There is no other third party whose function is constitutionally based, whose behavior is bound by a code of ethics which in this context is inconsistent with self protection and whose function must be independent of Department of Justice control.

We appreciate this opportunity to respond and will be happy to provide such other material as will be helpful.

Dated: June 20, 1986

Senator SPECTER. We will stand in recess.

[A recess was taken.]

The CHAIRMAN [presiding]. The committee will come to order.

This has been a hectic day. I had to go over to the White House this morning, then to an emergency meeting at Armed Services, and finally a ceremony in the Rotunda. I have a former governors' luncheon to attend immediately following this hearing.

Mr. Richardson, thank you very much for coming; a man as busy as you are, we deeply appreciate it.

Mr. RICHARDSON. Thank you, sir.

The CHAIRMAN. You have had such a distinguished record in the past. Are you representing the American Bar Association?

STATEMENT OF ELLIOT L. RICHARDSON, ON BEHALF OF THE CRIMINAL LAW SECTION, AMERICAN BAR ASSOCIATION, WASHINGTON, DC, ACCOMPANIED BY WILLIAM W. TAYLOR III, ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR, & KOLKER, WASHINGTON, DC

Mr. RICHARDSON. Yes, sir.

The CHAIRMAN. And Mr. Taylor, American Bar Association.

Mr TAYLOR. Thank you, Mr. Chairman.

Mr. RICHARDSON. Mr. Taylor and I are also accompanied by Mr. Don Santarelli, whom I am sure you know as the former head of the Law Enforcement Assistance Administration. We are the ABA team here today, or part of it.

The CHAIRMAN Would you mind taking 5 minutes and giving us the thrust of your statement? We will put your entire statement in the record. We have a conflict with so many meetings. It is unfortunate that we do. I would like to hear you for an hour, if we had time to do it. Your experience is worth so much.

Mr. RICHARDSON. Thank you very much, Mr. Chairman. I would be happy to do that.

The CHAIRMAN. I might ask the reporter, without objection, if you will put my statement in the record.

[The following was received for the record:]

PREPARED STATEMENT BY CHAIRMAN STROM THURMOND

Today we begin to examine the significantissue of forfeiture of assets intended for use as attorney's fees. This issue is a complicated one involving a balance between prosecution and law enforcement efforts to seize illicit assets and the rights of defendants to have the defense counsel of their choice. The varying approaches to this perplex problem must be scrupulously examined so that appropriate solutions can be achieved. These hearings today will begin the journey toward finding appropriate answers.

Although forfeiture can occur in a broad range of criminal cases, it often arises in major narcotics investigations and prosecutions. The illicit narcotic problem is one of immense proportion throughout the United States. Between 1981 and 1985, nationwide over 65,000 suspects were arrested and charged with drug-related offenses. This translates into the need for thousands of defense attorneys who must either be retained or appointed to represent these defendants. Those defendants who can afford to retain private counsel often compensate their private counsel with what may be illicit drug proceeds. This is not surprising as drug dealers make tremendous amounts of money. Between 1983 and 1985, Federal law enforcement agencies seized over $156 million of cash as a result of narcotics prosecutions. This figure only accounts for money actually seized. Without question, there are untold millions of dollars in illicit currency that Federal prosecutors and law enforcement agencies in this Nation are unable to seize through their most intense efforts.

Although illicit narcotic proceeds are the major area involving forfeitures, there are other areas of concern. For example, forfeiture of assets becomes an issue when an organization is one influenced by racketeering and other corrupt forces. Forfeiture of assets which are generated by such corrupt organizations and which are intended for use as attorney's fees is an issue that must be considered along with forfeiture of illicit narcotics proceeds.

Inquiry into this question raises constitutional considerations. The sixth amendment guarantees an accused the right to representation by counsel "in all criminal prosecutions." However, the U.S. Supreme Court has yet to define the latitude the sixth amendment accords an accused in the selection of retained counsel. Whether the right to counsel is a qualified right or not is an important issue directly related to the issue of forfeiture of assets. The constitutional parameters of the right to counsel must be examined as we attempt to resolve the forfeiture of assets issue.

We have an impressive panel of witnesses assembled for this hearing. The Department of Justice has sent one of its most knowledgeable assistant attorney generals. The American Bar Association and the National Association of Criminal Defense Attorneys have sent prominent representatives. The eminent Federal Public Defender from the Southern District of Ohio has come to share his knowledge in this area. We have with us a most distinguished constitutional scholar who will provide insight into the constitutional dimensions of this issue. I look forward to what I am certain will be a most informative hearing.

The CHAIRMAN. All right. You may proceed now, Mr. Richardson.

Mr. RICHARDSON. Thank you, Mr. Chairman. The testimony that you have received for the record points out that the relation-back doctrine under the statute that makes property subject to forfeiture is really a statute whose impact is to deprive defendants of the right to retain counsel.

The American Bar Association appreciates this opportunity to express its concern that unless it is amended, the act will have a profoundly dangerous effect on the adversary system.

I hasten to add, Mr. Chairman, that the American Bar Association does not oppose in all instances the forfeiture of moneys or fees received by attorneys. We do not oppose forfeiture, for example, where there are reasonable grounds to believe that an attorney has engaged in criminal conduct.

Furthermore, the ABA does not oppose forfeiture in cases where an attorney has accepted a fee as a fraud or a sham to protect the client's illegal activity. The ABA, however, strongly opposes forfeiture of fees earned by an attorney in the legitimate representation of a client.

The committee has heard earlier today, Mr. Chairman, testimony by Assistant Attorney General Stephen S. Trott, in which he underscored the seriousness of the public concern in the crimes reached by the RICO and CCE statutes.

I think I can fairly say, Mr. Chairman, that the colleagues who are seated with me here and I fully share the Government's concern on that score. I have myself served as a U.S. attorney, an attorney general of a State, and Attorney General of the United States, and I think that this is a point on which we can express concern from a basis of considerable understanding and experience.

The fact is, however, that the Department of Justice is obliged to recognize that the statutes involved here would deprive an accused of the right to select counsel. But it urges that the right to counsel is satisfied under these circumstances by appointment of a lawyer under the Criminal Justice Act.

Appointment of counsel, we submit, is no solution. In the first place, there is no right to appointed counsel during the investigative phase of a criminal case, even though the need for counsel at the grand jury stage is critical.

More importantly, lawyers are not fungible. It is not demeaning to the many attorneys who serve at reduced rates under the Criminal Justice Act and in the Federal public defenders offices to observe that cases in which forfeitures are sought are generally long and complex.

Forfeiture, in practical effect, is a form of punishment prior to trial, and thus a fundamental violation of due process. Forfeiture is not a means by which the United States raises revenue. The prosecutor is not a trustee in bankruptcy, but an adversary.

The Government has no legally cognizable interest in the amount of a defendant's assets until he is convicted. The possibility of conviction does not entitle the Government to impose the consequences of that conviction prior to trial.

The deprivation of funds necessary to hire counsel is all the more egregious because it affects the deprivation of a critical constitutional right. It not only deprives a person of property without due process of law; it deprives him of the right to counsel without that process.

The American Bar Association supports the efforts of Congress and of the Department of Justice to take the profit out of crime. We do not urge that all transfers to attorneys should be beyond the reach of forfeiture.

As I said earlier, sham transfers or transfers for the purpose of laundering funds are not at issue. Our concern is that in the process of implementing effective weapons against organized crime, we do not lodge in the Government the power to select its adversary.

That concludes my brief summary, Mr. Chairman. My colleagues and I would be glad to respond to questions if there is time.

The CHAIRMAN. We deeply appreciate your being here. Your full statement will go in the record and will be available to all Senators on the committee. We will bring your statement to the attention of the other members.

We have a few questions for you to answer for the record. If you would send your responses to staff, we would appreciate it.

Mr. RICHARDSON. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Taylor, did you want to supplement what he said?

Mr. TAYLOR. No, Mr. Chairman.

The CHAIRMAN. Has he covered everything?

Mr. TAYLOR. Yes; he has.

The CHAIRMAN. You all are working together?

Mr. TAYLOR. Yes, sir.

The CHAIRMAN. It is good to see you again, Mr. Richardson.

Mr. RICHARDSON. Thank you, Mr. Chairman.

The CHAIRMAN. You are looking well and we are honored to have you.

Mr. RICHARDSON. It is always a privilege to appear before this committee and under your chairmanship.

The CHAIRMAN. It is an honor to have you before this committee. You have a distinguished record of which the whole country can be proud.

Mr. RICHARDSON. Thank you, sir.

The CHAIRMAN. Thank you.

[The prepared statement follows:]

STATEMENT

of

ELLIOT L. RICHARDSON

AND

WILLIAM W. TAYLOR III

on behalf of the

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

concerning

FORFEITURE OF ATTORNEYS' FEES

MAY 13, 1986

My name is Elliot L. Richardson. I am pleased to appear before you today on behalf of the 315,000 lawyers and judges of the American Bar Association to present to you the Association's views on attorney fee forfeiture.

Accompanying me today is William W. Taylor, III. Mr. Taylor is a partner in the Washington D.C. law firm of Zuckerman, Spaeder, Goldstein, Taylor and Kolker.

The Association's position on this matter is contained in a policy adopted by the ABA House of Delegates in July 1985. A copy of the resolution and its accompanying background report are attached.

This Committee is considering the advisability of legislation concerning forfeitability of fees paid to lawyers for defense of criminal charges under the RICO and Controlled Substances Statutes as amended by the Comprehensive Forfeiture Act of 1984 (the "Act"). In what are now 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c), the Act provided that title to property subject to forfeiture vests in the government at the time the defendant commits an illegal act. This "relation back" doctrine has been the principal focus of the attorneys fee debate.

Under the Act, if a defendant is convicted, preconviction transfers by him to a third party of assets (including money) later found forfeitable are void. The government takes title to the assets regardless of whether the third party gave value for them. The third party may defeat the government's title only if he establishes in a separate proceeding that he is a bona fide purchaser for value and was reasonably without cause to believe the property was subject to forfeiture when he received it.

These provisions thus give the government the right to deprive third parties of bona fide payments for goods and services rendered to a defendant or his family. A potential defendant cannot assure providers to him of the necessities of life, including groceries, medical care, housing and legal services, that they

can safely accept his money. Accordingly, persons accused of RICO or Controlled Substances Act offenses may be and sometimes are unable to obtain basic necessities and unable to retain counsel.

We have been asked to present the position of the American Bar Association with regard to the impact of the Act on the right to counsel. Although participants in the debate often refer to it as "attorney fee forfeiture," that shorthand is not descriptive of the real issue. The Act has resulted in few, if any, actual forfeitures of fees received by lawyers. Its real impact is to deprive defendants of the right to retain counsel. The ABA appreciates this opportunity to express its concern that, unless it is amended, the Act will have a profoundly dangerous effect on the adversary system.

It is important to recognize that the ABA does not oppose, in all instances, the forfeiture of monies or "fees" received by attorneys. There are legitimate circumstances under which monies received by attorneys should be subject to forfeiture. For example, the ABA does not oppose forfeiture of attorneys' fees where there are reasonable grounds to believe that an attorney has engaged in criminal conduct. Furthermore, the ABA does not oppose forfeiture in cases where an attorney has accepted a fee as a fraud or a sham to protect the client's illegal activity. The ABA, however, strongly opposes forfeiture of fees earned by an attorney in the legitimate representation of a client.

It does not appear from the legislative history that any congressman or senator specifically intended that bona fide payments to lawyers should be forfeited. It is also true, however, that nothing on the face of the statute would exempt them. It is fair to say, as some courts have, that the legislative history of the "relation back" issue, particularly with regard to attorneys fees, is confusing. See e.g. United States v. Bassett, Criminal No. M-85-0541 (D. Md., April 11, 1986) slip. op. 8-9 (copy attached); United States v. Badalamenti, 614 F. Supp. 194, 197 (S.D.N.Y. 1985).

It is clear that "relation back" was enacted in response to concerns by the Department of Justice that defendants could, under existing law, avoid forfeitures by transferring property to nominees, engaging in sham transactions, or putting property beyond reach of the court. The reports do not, however, explain Congress' intent with regard to monies paid prior to conviction for legitimate necessities or counsel.

The senate Report (S. Rep. 98-225) states that the amendments are intended to deny relief to third parties "acting as nominees for the defendant or who have knowingly engaged in sham or fraudulent transactions," Senate report at 209, n.47, id. at 3392, suggesting that bona fide payments, including those for legal fees, should not be affected. The government has consistently urged, however, that this language does not exempt bona fide transactions for actual value unless the third party had no knowledge of the potential forfeiture. It points to language on the same page of the report which says that a third party would prevail only if he demonstrates that he gave value and "had no reason to believe that the property was subject to forfeiture." Id. See discussion of the arguments in United States v. Rogers, 602 F. Supp. 1332 (D. Col. 1985).

Almost every court which has considered the issue has held that if the Act is construed to deprive a defendant of the ability to retain counsel it would be unconstitutional. United States v. Bassett, supra; United States v. Reckmeyer, Cr. No. 85-00010-A (E.D. Va., March 27, 1986)(copy attached); United States v. Ianniello, 85 Cr. 115 (CBM)(S.D.N.Y. 1985); United States v. Badalamenti, supra; and United States v. Rogers, supra. These decisions have then construed the statute to avoid a confrontation with the Constitution and held that the Act does not provide for forfeiture of fees paid to lawyers for criminal defense services.

In In re Grand Jury Subpoena Duces Tecum, 605 F. Supp. 839 (S.D.N.Y. 1985), rev'd on other grounds, Dkt. No. 85-6066 (2d

Cir. June 27, 1985), however, the district court stated in dicta its disagreement with the holding in Rogers. And, in United States v. Thier, Cr. No. 84-60055-23 (W.D. La. 1985), the court explicitly declined to follow Rogers. Thier is now awaiting argument in the Fifth Circuit.

The issue has not been resolved by any court of appeals nor by the Supreme Court. It arises in every RICO and narcotics case in which the government seeks forfeiture. The danger created by the potential for forfeiture of attorney fees, as well as by the government's actual invocation of it, was well expressed by Judge Kane in United States v. Rogers:

> The government would possess the ultimate tactical advantage of being able to exclude competent counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries.

602 F. Supp. at 1350.

It is important that Congress act speedily to resolve the matter authoritatively. Regardless of the weight of precedent, the Department of Justice views its authority expansively. As long as the dangers described by Judge Kane are even potential, the balance of forces necesasry to an effective adversary system is in doubt. We recognize that the Department of Justice has promulgated Guidelines for Attorney Fee Forfeiture, but remitting the matter to prosecutorial discretion is inadequate. In any event, the Guidelines play no role in the decision to seek a restraining order which affects fees. They are invoked only when a prosecutor seeks an order requiring counsel to give up fees already paid.

The forfeiture provisions prevent a defendant from retaining counsel in two ways. The government may seek a pretrial restraining order which freezes some or all of a defendant's assets. These restraining orders typically restrain an accused from spending, for any purpose including retaining counsel, funds that may be forfeited. See United States v. Rogers; United States v. Ianniello;

and United States v. Reckmeyer. Even if the government does not obtain a restraining order, however, it can and does warn counsel that fees paid to them may be the subject of post-trial forfeiture if the client is convicted. See, e.g., United States v. Bassett. In either case the Act effectively prevents the defendant from retaining counsel to defend himself. As the court said in United States v. Badalamenti, the message to counsel is clear: "Do not represent this defendant or you will lose your fee." 614 F. Supp. at 196.

Responsible lawyers simply cannot accept representation under these circumstances. Because the fee is contingent upon the defendant's acquittal, representation is clearly prohibited by the Model Rules of Professional Conduct. Rule 1.5(d)(2). Likewise, counsel's financial interest in the outcome of the case creates a conflict of interest. An attorney can not be in a position where his advice to his client affects his own financial interest. If an attorney accepted a fee in the hope of demonstrating that he was not on notice of its forfeitability, it would be directly contrary to his interest to have free and open disclosure from his client. Finally, if forfeitability of the fee is in issue in the criminal trial, the government may attempt to call the attorney as a witness against his client and compel his disqualification. United States v. Badalamenti, supra.

In summary, then, it is impossible for an attorney to function effectively when his fee is potentially forfeitable. Whether the defendant is prevented from paying counsel by a restraining order or is merely unable to retain one because of the potential forfeiture, the effect is the same. He cannot hire a lawyer to defend himself against the very charges upon which the forfeiture is contingent. The results of a recent study by Professor William Genego published in Criminal Justice (Spring, 1986) demonstrate that in fact experienced defense counsel are not accepting representation when fee forfeiture is a possibility.

The Department of Justice does not dispute that the statutes deprive an accused of the right to select counsel. It urges that the right to counsel is satisfied under these circumstances by the appointment of a lawyer under the Criminal Justice Act.

Appointment of counsel is no solution. In the first place, there is no right to appointed counsel during the investigative phase of a criminal case. United States v. Mandujano, 425 U.S. 564 (1976), even though the need for counsel at the grand jury stage is critical. See Maine v. Moulton, 106 S.Ct. 477 (1985).

More importantly, lawyers are not fungible. It is not demeaning to the many attorneys who serve at reduced rates under the Criminal Justice Act and in the federal public defenders to observe that cases in which forfeitures are sought are generally long and complex. Judges Kane and Motley made precisely that observation in Rogers and Iannielle. Representation in the complex litigation under RICO and the Continuing Criminal Enterprise section of the Controlled Substances Act usually requires a level of experience not available among appointed counsel. It also requires a time commitment that will severely burden the already overworked public defenders. On March 13, 1986, the Administrative Office of the United States Courts issued a memorandum to all federal courts urging that, in light of the Gramm-Rudman-Hollings legislation, courts utilize public defender services rather than appointed counsel systems and recommends that millions of dollars be cut from the budgets of these same public defender services. Relevant portions of that memorandum are reproduced and attached to this testimony.

In practical effect, the government's position imposes punishment prior to trial, a fundamental violation of due process. The right to select counsel is constitutionally protected. United States v. Laura, 627 F.2d 52, 54 (5th Cir. 1978). The forfeiture amendments, as construed by the government, deprive a defendant of that right before conviction. The notion that criminals should not profit from illegal activity has an unassailable appeal. Nevertheless, in our system, a citizen is not punished until he is convicted. Depriving him of the right to use assets

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Approved as American Bar Association Policy
by the ABA House of Delegates - July 1985

The resolution only constitutes
Association policy. The report
is provided for background.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect illegal activity of a client.

REPORT

The attempt by certain United States Attorneys' Offices to bring about the forfeiture of attorneys' fees pursuant to the recently enacted Comprehensive Crime Control Act of 1984 raises fundamental questions striking at the heart of our adversary system. Ultimately, forfeiture of attorneys' fees, if successful, will take the "adversary" out of the adversary process. Policies central to the adversary system are threatened by the practice of forfeiting attorneys' fees.

This Report provides a brief discussion of the new law, an explanation of why the Recommendation is critical, and a review of the recent cases dealing with this subject.

FORFEITURE AMENDMENTS UNDER THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

The forfeiture amendments contained in the Comprehensive Crime Control Act of 1984 (signed into law 10/12/84) were passed for the purpose of increasing the government's powers in forfeiture actions qud to eliminate the ambiguities which existed in prior forfeiture law concerning in personam forfeiture. Through these amendments, the forfeiture provisions of the RICO statute were changed and a new forfeiture section was added to the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 et seq., which applies to all felony drug offenses under the Act, including Continuing Criminal Enterprise (21 U.S.C. §848). The amended RICO forfeiture provisions and the new drug forfeiture sections are virtually identical. The primary purpose of the new forfeiture legislation was to curtail the ability of a defendant to transfer potentially forfeitable assets before conviction.

The new forfeiture provisions provide that forfeiture vests title in the United States on the commission of the act giving rise to forfeiture. Any subsequent transfer by the defendant to some other person, may be the subject of a special verdict of forfeiture. (See, e.g. 21 U.S.C. §853(c)).

The transferee is entitled to a post-verdict judicial hearing at which time the transferee may establish that he or she has made a bona fide purchase for value and has a superior property interest in the assets subject to forfeiture. The transferee must establish that at the time of the purchase he or she was "reasonably without cause to believe that the property was subject to forfeiture." In addition the Act provides that the government may obtain pre- and post-indictment orders prohibiting the transfer of assets by defendants to third parties.

The issues surrounding potential forfeiture of attorneys' fees have been raised in various settings. In Rogers, discussed at length below, the government sought a post-indictment restraining order prohibiting any transfer of the defendant's assets, including payments by the defendants to their attorneys.

This is the only reported decision squarely on point. In Payden and Simel, discussed at length below, the government sought to compel the defense attorney, post-indictment, by a grand jury subpoena, to disclose fee and fee source information. This information would be used as additional evidence of "substantial income," an element of the "continuing criminal enterprise" count, against the defendant, and as evidence relevant to the special verdict of forfeiture. In Sheehan and Groh, the government requested forfeiture of the attorney's fees in the indictment and issued trial subpoenas to the defense lawyers for fee and fee source information. (The trial subpoenas have now been withdrawn.)

SYNOPSIS OF THE IMPACT THAT ATTORNEY FEE FORFEITURE WILL HAVE ON THE CRIMINAL JUSTICE SYSTEM

Forfeiture of fees paid to lawyers who defend persons accused of crimes will have a dramatic impact on the criminal justice system as we now know it. It would mean that the government possesses the capability to control the representation of an accused in complex criminal cases in the following ways:

(1) By forcing withdrawal or disqualification of the accused's defense lawyer of choice by a number of means: e.g., non-payment of fees, disruption of the attorney-client relationship and creating a conflict by calling the defense lawyer as a witness.

(2) By forcing the accused to have court-appointed counsel, thus increasing the government's tactical advantage by supervising and limiting the resources of each defendant's defense.

(3) By forcing talented lawyers to refrain from entry into the criminal defense arena because:

a) they may never be compensated for their services; and/or

b) they will be compelled to act in violation of professional ethical codes such as the Model Rules of Professional Conduct (See, Rule 1.5(d)(2)) and the Model Code of Professional Responsibility (See, DR2-106(C)) by accepting a contingent fee arrangement in a criminal case.

If fees paid for services, which are legitimately earned in the defense of the accused, are forfeited, then accepted notions of effective assistance of counsel, counsel of choice, and a balanced adversary system will have been turned on their respective heads. Defense lawyers' testimony will incriminate their clients on the very matter for which their services were sought. The right to counsel will be empty because it will depend upon what the government is willing to provide for a particular defendant. The right to counsel of choice will be hollow because defense lawyers will be viewed as fungible goods. The confidential relationship between lawyer and client will be vulnerable to the whim of the government subpoena. Accused persons will be deprived of access to the most talented, experienced lawyers of the criminal defense bar because the government will force their withdrawal.

Whether the legal arguments advanced by defense lawyers result in the persuasion of courts (as was the case in Rogers, infra, but not Payden, infra), remains to be seen. If permitted, forfeiture of attorney fees will have the impact just discussed. The practical realities engendered by the forfeiture of attorneys' fees, not constitutional considerations, will cause these changes to occur; and as such, forfeiture of attorneys' fees for services legitimately rendered represents a policy detrimental to our system. This policy should be opposed regardless of agreement with the specific legal arguments advanced to oppose this practice.

With these thoughts in mind, below is a summary of the arguments opposing the forfeiture of attorneys' fees:*

---

* Nota Bene: These same arguments are expanded upon and articulated far more eloquently [than is presented by this summary] in Rogers, infra.

1. The legislative history of the amendments to the Comprehensive Crime Control Act of 1984 supports the principle that a defendant's transfer of assets to a third person should be voided only when the transfer constitutes an artifice or sham whose purpose is to avoid forfeiture. Fees paid to an attorney who legitimately earned them by providing legal services to the defendant do not constitute an artifice or a sham transaction.

2. The legislative history indicates that the amendments to the Comprehensive Crime Control Act of 1984 dealing with forfeiture were not designed to interfere with the accused's right to effective assistance of counsel. Whenever possible courts should avoid an interpretation which renders a statute unconstitutional. Permitting the forfeiture of fees paid to an attorney which are not part of a sham transaction to avoid forfeitures impinges upon the accused's right to effective assistance of counsel in the following ways:

a) The defendant's lawyer of choice may be forced to withdraw or be disqualified because of deliberate acts of the government.

b) The forced revelation of any confidential communication between the lawyer and the client shatters the attorney-client relationship.

d) The defense attorney will be forced to enter into a prohibited and unethical contingent fee agreement to represent the accused.

e) The defense lawyer must devote substantial time and energy to battle the government on this issue while his/her time and resources are needed to prepare the defense of the accused.

Therefore, to avoid these constitutional problems, attorneys' fees, not part of a sham transaction, should not be forfeitable under the Act.

3. Forfeiting attorneys' fees undermines the balance of the adversary process and violates due process of law in the following ways:

a) It permits the government to pick and choose counsel for the accused.

b) It permits the government to limit the resources and to supervise the defense of the accused.

c) It gives the government an enormous tactical advantage over the accused by its ability to manipulate the defendant's lawyer through limiting the resources available to the defense.

4. A violation of the equal protection clause occurs when forfeiture of funds paid by the defendant are sought in the indictment and only attorneys' fees are specifically singled out for forfeiture, while other funds paid by defendant to third parties are not, as in the Sheehan and Groh case *infra*.

RECENT RELEVANT CASES INVOLVING
FORFEITURE OF ATTORNEYS' FEES

United States v. Rogers
No. 84-CR-337, 36 Crim. L. Rep. (BNA) 2409
(D. Colo. Feb. 22, 1985.)

The case of United States v. Rogers involved a RICO indictment alleging, inter alia, forfeiture under the Comprehensive Crime Control Act of 1984 where the government sought to restrain all transfers of defendants' assets. Defense attorneys moved to exclude attorneys' fees and costs from the forfeiture sought by the government in the indictment.

The Court discussed what transferred assets are subject to forfeiture under the Comprehensive Crime Control Act of 1984. After referring to the new language of the Act, Section 1963(c)(RICO statute) and the legislative history of subsection (c), it held that an order of forfeiture reaches property of the defendant only where the transfer is an artifice or sham to avoid forfeiture. The Court reasoned that the Act imposes a constructive trust which nullifies transfers by a defendant designed as an artifice or sham.

An attorney who receives funds in return for services legitimately rendered operates at arm's length with his client, and not as part of an artifice or sham to avoid forfeiture.

> Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered. Congress did not intend to include in those forfeitable items the compensation already paid for goods and services legitimately provided. This does not, however, mean that assets transferred to a lawyer as part of a sham will not be subject to forfeiture. (Emphasis supplied)(Slip. Op. at 22)

Requiring an attorney to testify at a post-conviction hearing on the forfeitability of his fees will result in disclosures by the attorney going far beyond the traditional exception to the attorney-client privilege because the fee information is not privileged unless its disclosure would implicate the client in a crime. Such a forced disclosure will chill communications between client and lawyer, impinging upon the right to counsel.

Permitting the government to force counsel on the accused (by court-appointment) and manipulate, if they so choose, which defense lawyer must withdraw, upsets the delicate tri-partite balance of the adversary system:

> The impact on the adversary process occasioned by the ability of the government to seize attorney fees is of even greater concern. The retort to the claim of denial of counsel of one's choice, that appointed counsel is available, pays no more than lip service to due process and the right to counsel. This view ignores the exigencies of RICO cases....The government brings to bear significant resources to prosecute these cases. Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. It is not consistent with due process to create a situation which eliminates the adversary from the adversary process.
>
> Central to due process is the "balance of forces between the accused and his accuser." Wardius v.

Oregon, 412 U.S. 470, 474 (1973). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). The interpretation of the Comprehensive Forfeiture Act of 1984 suggested by the government would undermine the very principles underlying the adversary system. The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries. While I presume that most prosecutors act in good faith, I cannot ignore the potential for prosecutorial manipulation of a grand jury which I saw in United States v. Kilpatrick, 594 F.Supp. 1324 (1984) and United States v. Anderson, 577 F. Supp. 223 (D. Wyo. 1983). Due process cannot tolerate even the opportunity for such abuse of the adversary system. (Slip Op. at 24-25.)

Reasoning that the Act must be interpreted to avoid a ruling that it violates the accused's right to counsel, the Court granted the defendants' motions to exclude attorneys' fees and costs from forfeiture.

Simels, Payden v. United States of America
No. M-11-188 (DNE), 36 Crim. L. Rep (BNA) 2003
(S.D.N.Y. March 11, 1985)(adoption of theory that defense lawyers are fungible goods). Appeal to the Second Circuit, Oral Argument set for April 26, 1985.

The Simels case involved a "continuing criminal enterprise" indictment and a trial subpoena duces tecum issued to the lawyer, Simels, for fee and fee source information. The trial subpoena was withdrawn because a sitting grand jury issued a subpoena duces tecum to Simels requesting the same fee and fee source information. The court upheld the grand jury subpoena of Simels and summarized its opinion by stating "the defendant has and will continue to receive the effective assistance of counsel, whether represented by Simels or another attorney." In the process of reaching this conclusion the court made the following statements:

(a) The disclosure of the fee arrangement between Simels and Payden is not protected by the attorney-client privilege. The fact that disclosure of fee information may be incriminating, does not deny the defendant any Sixth Amendment rights. Defense counsel's ability to formulate defense strategy and prepare for trial is not impaired by divulging his fee arrangement. The destruction of the trust between the attorney and client is a "makeweight" argument.

(b) The time and resources required by counsel to respond to the subpoena will not effectively prevent him from acting as counsel to Payden. The lawyer will not be discouraged from conducting a proper defense because of the threat to forfeit his fees because the professional ethics require zealous advocacy despite the risk that he will not be paid. If either the lawyer or the client feels that the lawyer "can no longer provide effective representation in this case, the court will ensure that Payden is represented

by counsel who will provide effective representation of Payden's interests." (Slip Op. at 15-18)

(c) Should it be necessary for the attorney to testify at the trial (because his testimony concerning fee information is relevant to the "substantial income" charge under Section 848(a) and the forfeiture sought by the government in the indictment) the lawyer will have to be disqualified. Such disqualification, however, will not violate the defendant's Sixth Amendment rights to assistance of counsel. The court may order a limited disqualification but permit "Simels to continue to assist with Payden's defense, but not appear and consult in front of the jury." (Slip Op. at 24)

(d) With respect to the defendant's claim of abuse of grand jury process violating his Fifth Amendment due process rights because the government is using the grand jury subpoena to his lawyer as a discovery tool to accumulate evidence for the pending CCE trial, the court holds that the government is entitled to investigate the matter fully, provided that there is no harassment or bad faith shown by the subpoena of Simel.

It remains to be seen whether this case will withstand the scrutiny of appeal to the Second Circuit. A number of recent appellate cases articulate potential grounds that could result in a failure to sustain the district court decision. One of these grounds is the failure of the Court to adhere to the basic thrust of In Re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984). In this case five defense lawyers were served with Federal grand jury subpoenas requesting fee and fee source information shortly before they were about to start a state court trial involving the same clients. The First Circuit upheld the lower court's decision to quash the subpoenas:

> In this case the court was presented with a subpoena whose enforcement at the particular moment seemed to it likely to entail consequences more serious than even severe inconveniences occasioned by irrelevant or overboard requests for records. To call defense attorneys before the grand jury, in connection with an investigation of the same activities for which their clients were standing trial in state court, while the attorneys were preparing for this major felony trial, could be taken as veiled threat, with such potential for harm to the state defendants and the defense bar as to require the government to show with some particularity why the grand jury's investigation required the execution of the subpoenas at this particularly sensitive moment. Id. at 18.

Another possible basis for reversal can be found in the recent Second Circuit case of Roe v. United States, No. 84-6319 (2nd Cir. April 1, 1985). In a two-to-one decision, the Court held that a grand jury subpoena to the target's attorney, who had represented the target for some eighteen years, should be quashed unless the government shows that the information it seeks can be obtained only from the defense lawyer. The court based this decision upon the protection of the attorney-client relationship:

> First, the unbridled use of the subpoena would potentially allow the Government, in this and future cases, to decide unilaterally that an

> attorney will not represent his client. Such a power of disqualification can undermine and debilitate our legal system by subjecting the criminal defense bar to the subservience of a governmental agent. The unrestricted exercise of this power without adequate justification does not strike us as necessary or indispensable in an adversary system of criminal justice, particularly when we consider the significance of the attorney-client relationship and the need for an independent bar. Second, as noted earlier, the right to have counsel of one's choosing in the defense of a criminal charge is of constitutional dimensions. Thus, any potential infringement of this right must only be as a last resort. ... Requiring adequate justification will prevent the arbitrary dismissal of an attorney, and still protect the grand jury's access to information if the Government can demonstrate that the attorney's testimony is not only relevant but that there is a need for it that cannot reasonably be met in some other fashion. (Slip Op. pp. 16-17)

Sheehan and Groh
Case No. CRF No. 84-198 REC (E.D. Cal. argued April 8, 1985)

In this case of first impression, the government in a "continuing criminal enterprise" forfeiture case, included in the indictment, a request for the forfeiture of attorneys' fees:

> Any and all fees in the form of currency, real and/or personal property or other thing of value paid or transferred after November 14, 1984 (the date of the arrest) by or on behalf of the defendant and to the attorney(s) representing him or a co-defendant, or as a result of this matter, which currency, real and/or personal property or other thing of value is owned or possessed by defendant prior to the transfer to said attorney(s).

Before indictment, defense attorney Neal Sonnett received a "Notice Letter" indicating that the government sought forfeiture of any attorney's fees received by him and that any effort to dispose of his clients' fees would expose Sonnett to criminal prosecution for obstruction of justice. Counsel for co-defendant Groh, Albert Kreiger, received a similar letter. After indictment, both Sonnett and Kreiger received Rule 17(c) subpoenas seeking fee records and fee source information of their clients. The subpoenas have now been withdrawn.

The case has been briefed and argued, but no decision has been announced.

CONCLUSION AND SUMMARY

The foregoing report, and the cases cited in it, provide ample illustration of the dramatic detrimental impact that forfeiture of attorneys' fees is having on our system of criminal justice. It is worthwhile summarizing these effects as a means of concentrating attention on the magnitude and breath of their impact.

Accordingly, the following list recites the more serious ramifications of the attorney fee forfeiture practice:

1. It denies an accused the right, under the Sixth Amendment, to retain counsel of his or her choice;

2. It impedes the ability of such retained counsel to render effective assistance;

3. It impairs the relationship of confidence and confidentiality between an accused and his or her counsel;

4. It allows the government to manipulate the roster of counsel, or to disqualify counsel by seeking to compel testimony by the lawyer against the client;

5. It discourages or disallows competent attorneys from agreeing to represent clients in criminal cases which involve allegations of forfeiture; and

6. It diverts the efforts and energies of attorneys from the preparation of the defense of an accused by requiring them to litigate issues related to their attorney-client relationship.

If the forfeiture practice continues unabated and becomes a widely accepted prosecutorial practice, the resulting effects recited above will erode the elements that assure fundamental fairness and balance in our criminal justice system. It is the ABA Criminal Justice Section's concern that these elements continue to be an integral part of our system of justice that leads to this resolution's adoption.

Respectfully submitted,

Paul T. Smith, Chairperson
Criminal Justice Section

July, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. M-85-0541
RONALD BURNELL BASSETT CLARENCE MEREDITH	: :	

Filed: April 11th, 1986.

Breckinridge L. Willcox, United States Attorney, and Harvey Eisenberg, Assistant United States Attorney, Baltimore, Maryland, for plaintiff.

Ronald Rubinstein, Kew Gardens, New York, for defendant Bassett.

Leslie A. Stein, Baltimore, Maryland, for defendant Meredith.

MILLER, District Judge.

MEMORANDUM AND ORDER

The defendants Ronald Bassett and Clarence Meredith have moved for an order exempting the fees they are paying their attorneys to represent them in this case from forfeiture to the government pursuant to 21 U.S.C. §§ 848, 853, and 881 (Paper No. 416). The defendants contend that forcing their lawyers to forfeit their fees violates the defendants' constitutional right to counsel of choice; creates a potential conflict of interest between lawyer and client; undermines the attorney-client privilege and poses a threat to the adversary system (id.).

APPENDIX A

The government argues that the constitutional right to counsel of choice is a qualified right which must give way to the public interest if need be. Further, the government contends forfeiture does not bar defendants from paying their lawyers with assets earned through legitimate enterprises. Finally, the government asserts that the legislative history

of the statute indicates Congress did not intend to exempt legal fees from the forfeiture provision (Paper No. 437 at 12-14).

Factual Background

Defendants Ronald Bassett and Clarence Meredith have been charged with conducting a continuing criminal enterprise under 21 U.S.C. § 848 in connection with a conspiracy to possess and distribute heroin. Mr. Bassett was also charged with interstate travel in aid of distributing heroin, possession with intent to distribute heroin and distribution of heroin. Mr. Meredith was also charged with intent to distribute and distribution of heroin and income tax violations (Paper No. 261). On January 27, 1986, Assistant United States Attorney Ty Cobb advised counsel for both defendants by letter that the government intended to seek forfeiture after trial of the legal fees paid to them by these defendants in connection with this matter (Paper No. 416, Exh. 1).

As a result, both attorneys have requested the court to exempt their fees from forfeiture. The lawyers have indicated that their continued appearance in this case is conditioned on their fees being exempt from forfeiture (Paper No. 416, Rubinstein Affidavit, ¶ 5).

A hearing on this matter took place on April 3, 1986. For the reasons herein stated, the motion of the defendants will be granted.

Legal Analysis

The Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 12, 1984), altered existing criminal forfeiture law so as to permit the government to obtain from convicted criminals those assets earned through certain illegal activities even if those assets a) have been transferred to third parties; and b) were transferred to third parties prior to conviction. In other words, the criminal forfeiture "relates back" to the commission of the illegal act which

"gives rise to the forfeiture." (Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim. L. Rep. No. 1, 3001 (hereinafter "Justice Department Guidelines")).

The relevant question here is whether the statute's third party forfeiture provisions apply to bona fide legal fees paid by the defendants to their attorneys. Few courts have yet had the opportunity to consider this question in light of the new criminal statute. Two courts which have examined it pursuant to the forfeiture provision of 18 U.S.C. § 1963(m), which is part of the Racketeer Influenced and Corrupt Organizations (RICO) statute and is identical to the forfeiture provision of the drug statute at issue here, have held that attorneys' fees and costs were exempt from forfeiture. United States v. Ianniello, S 85 Cr. 115 (CBM) slip op. (S.D.N.Y. Sept. 3, 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

Another court in the Southern District of New York considered the issue in the context of a motion to quash a Rule 17(c) subpoena and also determined that attorneys' fees could not be forfeited to the government. United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985). In the case of In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 605 F. Supp. 839, 849 n.14 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985), the court in dicta in a lengthy footnote reached the opposite conclusion and said such fees were subject to forfeiture.

Several other courts, including the Fourth Circuit, indicated in dicta in decisions reached prior to the enactment of the new forfeiture statute, that if faced with the question at that time they might have permitted attorney fee forfeiture. See United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, Bello v. United States, 105 S.Ct. 133 (1984); United States v. Long, 654 F.2d 911, 915-17 (3d Cir. 1981). Apparently, however, this is a question of first impression in this District and in the Fourth Circuit.

a) Threshold Issue - Standing and Ripeness

The defendants assert they have standing to challenge the government's intention to seek the forfeiture of the fees they pay to their lawyers (Paper No. 416, Memorandum at 2). The government has not addressed this issue.

Generally, a plaintiff cannot "rest his claim to (judicial) relief on the legal rights or interest of third parties." Secretary of State of Maryland v. Joseph H. Munson Co., 104 S.Ct. 2839, 2846 (1984) quoting Warth v. Seldin, 422 U.S. 490, 499 (1975). To establish standing, a party wishing to invoke the authority of the court must show he has suffered a real or threatened injury which is fairly traceable to the challenged action and able to be remedied by the court. Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 444 (D. Md. 1985). Thus, when actions affecting a third party impact adversely on the rights of a party to the action, that party has standing to assert his own rights. United States v. Rogers, 602 F. Supp. at 1335 citing Taylor v. Louisiana, 419 U.S. 522, 526 (1975).

Here, the defendants assert their constitutional right to counsel of choice will be impaired if the government is allowed to force forfeiture of their attorneys' legal fees. Clearly, the defendants have standing to assert this claim.

Although not raised by the parties in the pleadings, the question also arises whether the case is sufficiently ripe for decision. Although the government has not actually instituted forfeiture proceedings against these lawyers, it has made it clear that it intends to do so. Moreover, the lawyers in this case have stated that their continued participation in this case is contingent upon their receiving a favorable determination of this matter now. Thus, the defendants face the possibility of being without counsel less than two months before going to trial on extremely

serious charges with potentially severe penalties. Therefore, the adverse consequences to the defendants of the government's announced intention is immediate, not an ephemeral potentiality. The issue is ripe for immediate resolution and demands immediate attention from the court.

b) Statutes at Issue and Congressional Intent

The relevant provisions of the applicable forfeiture statutes read as follows:

"§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of ... and to the forfeiture prescribed in section 853 of this chapter;....

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly as the result of such violations;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes-

(1) real property, including things growing on, affixed to, and found in land; and
(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section ...."[1]

Arguably, § 853(c) may be read to reach a very broad class of persons as third party transferees. Fees paid to lawyers are not expressly exempted. Thus, bona fide fees paid to an attorney under the literal terms of the statute seemingly would be subject to forfeiture unless counsel was, as noted in the statute, "reasonably without cause to believe" the fees were so subject.

How is this standard of being "reasonably without cause to believe" to be measured in the case of attorneys? Is the attorney under a duty to inquire as to the source of each client's funds? Is the attorney on constructive notice that a client's funds may be subject to forfeiture if the client has been convicted in the past of drug or RICO offenses? Is indictment under § 848 or RICO sufficient to give an attorney reasonable cause to believe the funds may be subject to forfeiture? Because the statute is not clear on its face in this respect, one must look to the legislative history for further guidance. United States v. Turkette, 452 U.S. 576, 580 (1981).

---

[1] 21 U.S.C. § 881 describes the types of property subject to forfeiture and will not be cited in full here.

Unfortunately, the legislative history of the Comprehensive Crime Control Act does not provide bright illumination of Congressional intent in this regard.[2] It does, however, fully explain the intent of Congress in amending the statute, which was clearly to toughen the forfeiture provisions. Law enforcement authorities were apparently being thwarted, by fraudulent transfers to third parties, in attempts to obtain the lucrative proceeds of illegal drug and racketeering adventures. "No mechanism exists in current law to protect against improper transfers or concealment of assets at an earlier stage (before indictment or criminal information)." S. Rep. No. 225, 98th Cong., 2d Sess. 194 (hereinafter Senate Crime Report) reprinted in 1984 U. S. Code Cong. & Ad. News 3377. It was obvious to legislators that the then current statute was ineffective in reaching the proceeds of criminal activity.

> "[T]he criminal forfeiture provisions of the RICO and CCE statutes fail adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction. Unlike civil forfeitures, in which the government's seizure of the asset occurs at or soon after the commencement of the forfeiture action, in criminal forfeitures, the assets generally remain in the custody of the defendant until the time of his conviction for the offense upon which the forfeiture is based. Only after conviction does the government seize the asset. Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.

---

[2]Historically, forfeiture of personal goods and chattels was automatic under the common law following conviction of treason and some other felonies. Forfeiture was abolished by statute in 1790 during the first Congress. S. Rep. No. 225, 98th Cong., 2d Sess. 81-82 reprinted in 4 U.S. Code Cong. & Ad. News 3182, 3264-65 (1984). Criminal forfeiture was not reinstated until 1970 when Congress passed Title IX of the Organized Crime Control Act and Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (18 U.S.C. § 1963 and 21 U.S.C. § 848(a)(2)). Id. at 3265. It was these statutes which were amended in 1984 through the Crime Control Act. Id. at 3375.

Currently, the only mechanism available to the government to prevent such actions is the authority to obtain a restraining order and this statutory authority is limited to the post-indictment period. Thus, even if the government is aware that a person is disposing of his property in anticipation of the filing of criminal charges against him, it has no specific authority under the RICO or CCE statutes to obtain an appropriate protective order. Furthermore, even if the government is able to obtain a restraining order, should the defendant choose to defy it, he can effectively prevent the forfeiture of his property and face only the possibility of contempt sanctions for his defiance of the court's order. The important economic impact of imposing the sanction of forfeiture against the defendant is thus lost.

Although current law does authorize the issuance of restraining orders in the post-indictment period, neither the RICO nor CCE statute articulates any standard for the issuance of these orders. Certain recent court decisions have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation and have also held the Federal Rules of Evidence to apply to hearings concerning restraining orders in criminal forfeiture cases. In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order - the sole means available to the government to assure the availability of assets after conviction - quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims in racketeering and narcotics trafficking cases who would be required to testify at the restraining order hearing.

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. In civil forfeitures, such transfers are voidable, for the property is considered 'tainted' from the time of its prohibited use or acquisition. But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable so that improper pre-conviction transfers may be voided.

In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture,

> and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture...."

Senate Crime Report, 195-96; id. at 3378-79 (footnote omitted).

The Senate Report further discusses at some length the purpose behind the amendment concerning third party transfers in the context of Section 1963(c) of the RICO statute. This section, as amended, is identical to the criminal forfeiture provision of § 853(c), and thus the discussion of the RICO amendment is instructive here. It reads in pertinent part:

> "The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms length' transactions. On the other hand, this provision should not operate to the detriment of innocent bonafide purchasers of the defendant's property...."

Senate Crime Report at 200-01, id. at 3383-84.

Finally, the Senate Report discusses the mechanics of the third-party criminal forfeiture procedure as outlined in 18 U.S.C. § 1963(m).[3] The Report states:

> "...[A] third party will prevail ... where the petitioner acquired his legal interest after the

---

[3]This section is identical to 21 U.S.C. § 853(n). Section 18 U.S.C. §1963(m) reads as follows:

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

> acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture."

Senate Crime Report at 209, id. at 3392. A footnote to that passage, however, offers a somewhat contradictory caveat. "The provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. 1963(c), as amended by

---

footnote #3 cont'd.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(As amended Pub.L. 98-473, Title II, §§ 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040, 2192).

the bill." (Emphasis supplied). Senate Crime Report at 209, n.47, id. at 3392.

c) Case Law Analysis

In analyzing the legislative history of the statute in the context of a RICO forfeiture action, the court in United States v. Rogers reached the following conclusion:

> "An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered."

602 F. Supp. at 1348.

Likewise, in the Ianniello decision the court relied on its interpretation of the legislative history to reach the conclusion that "bona fide attorneys' fees paid to defense counsel who serve the defendants' needs within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture." Ianniello, slip.op. at 8-9.

The court in the Badalamenti decision acknowledged that a literal reading of 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) appeared to include the payment of legal fees. 614 F. Supp. at 196. The court determined, however, that such a conclusion would raise insurmountable constitutional problems for the client and ethical concerns for the attorney. Id.

The government contends that "these decisions are incorrect." Justice Department Guidelines, 38 Cr.L. at 3002. The statute on its face fails to establish any exemption for legal fees, according to the government. Further, the government notes that the Senate report cited by the Rogers, Ianniello, and Badalamenti courts also cited with approval the decision of United States v. Long, 654 F.2d 911 (3d Cir. 1981), Justice Department Guidelines, 38 Cr.L. 3003. In Long, an airplane, owned by the defendant convicted of a continuing criminal

enterprise in connection with his involvement in an international drug smuggling enterpise, was determined to be forfeitable even though it was transferred to the defendant's attorney before the defendant's conviction. The attorney then attempted to sell the plane. 654 F.2d at 913, 917. The case was cited by the Congress as an example of an effort to transfer forfeitable assets. Senate Crime Report at 200, n.28 198, 4 U.S. Code Cong. & Ad. News (1984) at 3383.

The government also relies on dicta in In re Grand Jury Subpoena, supra, to support its position. In discussing the matter before it, which was a motion to quash a subpoena for information on attorneys' fees served on counsel for a defendant charged with a continuing criminal enterprise, the court stated that fees paid to his attorney were forfeitable. Also analyzing the legislative history, the court stated the lawyer was on notice, as required by the statute, from the moment he read the indictment that the defendant's assets were subject to forfeiture. 605 F. Supp. at 849-50, n.14. "One who receives funds with the knowledge that the funds are subject to forfeiture cannot be said to have entered into an arms length transaction regardless of the price paid for the good or service." Id. at 849. Further the court stated:

> "Fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprise. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same funds." Id. at 850.[4]

---

[4]The Rogers and In re Grand Jury Subpoena courts also considered the meaning of a passage in a House Judiciary Committee report discussing a provision in the amended drug control act relating to the use of pretrial restraining orders in connection with in personam forfeitures. The Rogers court noted that the House panel stated: "'[n]othing in this section [dealing with in personam forfeiture] is intended to interfere with a person's Sixth Amendment right to counsel.' Hse. Rep. 845, part 1, 98th Cong., 2d Sess., Rept. of the Committee on the Judiciary Concerning Comprehensive Drug Penalty Act of 1984, p. 19 n.1." 602 F. Supp. at 1347-48.

The court in In re Grand Jury Subpoena contended "[t]his reliance [on the above quoted House panel passage] ... is misplaced" and quoted from the next sentence of the report: "'[t]he Committee, therefore does not resolve the conflict in District Court opinions on the use of restraining orders that

The Fourth Circuit tangentially examined this issue in the Raimondo decision. In this case, a couple, James and Carol Bello, and Paul Raimondo were convicted of a conspiracy to distribute cocaine. James Bello was also convicted of engaging in a continuing criminal enterprise. 721 F.2d at 477. Carol and James Bello challenged the forfeiture to the government of the profits from three of James Bello's properties which were held by Carol Bello and the couple's lawyer. Id. The court determined that Mrs. Bello was involved in her husband's activities and aware of the criminal source of his assets. The lawyer was on notice of the forfeiture potential from reading the indictment. Id. at 478. Therefore the proceeds held by both were forfeitable. Id.

The court specifically stated, however, that its decision in Raimondo was not final as to the lawyer. "Our disposition of this case does not bar Rosen (Bello's lawyer) or his law firm from opposing the government's forfeiture of the realty conveyed to them. Neither Rosen nor his law firm is a party to this criminal action, and our decision is not res judicata with respect to them." Id.

The legislative history of the criminal forfeiture amendments to the Crime Control Act is, at times, contradictory. It can legitimately be subject to varying interpretations. Nonetheless, it is reasonable to conclude that the problem faced by lawmakers, and the problem they sought to remedy, was that of defendants purposefully hiding assets arguably subject to forfeiture to avoid relinquishing them to the government. A reasonable inference to be drawn is that

(Ft. NOTE CONTINUED)
impinge on a person's right to retain counsel in a criminal case.'" 605 F. Supp. at 850, n.14. The court continued: "Clearly, Congress intended, not to resolve the sixth amendment conflict through this legislation, but to leave the resolution of these issues to the courts." Id.

The Badalamenti court also injected itself into this debate by asserting that In re Grand Jury Subpoena has improperly interpreted the quoted passage. "In my view, the sentence noted ... addresses a different problem. It is the difficulty the accused may experience in hiring and paying a lawyer if the funds of the accused have been sequestered in anticipation of eventual forfeiture." 614 F. Supp. at 197.

it is such sham, fraudulent transactions which Congress specifically intended to single out for remedy. The attorney representing a client under indictment for a RICO violation or a continuing criminal enterprise drug-related offense is certainly not "innocent" of knowledge that the money with which he is paid might be tainted. He is certainly not, however, just a bogus conduit for this money when providing bona fide legal services.

This interpretation of the statute is further supported when one considers the constitutional implications of the government's position. As stated by the court in Ianniello, "in deciding among possible interpretations of a statute, the court must select an interpretation that appears to be consistent with the constitutionality of the statute." Ianniello, slip.op. at 9, citing Gutknecht v. United States, 396 U.S. 295 (1970); United States v. Rumely, 345 U.S. 41, 45 (1953).

The constitutional principle at issue here, of course, is the Sixth Amendment right to counsel. The Sixth Amendment provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The right to counsel is of such importance "that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" Powell v. Alabama, 287 U.S. 45, 67 (1932), quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926). See also United States v. (Under Seal), 774 F.2d 624, 627 (4th Cir. 1985). The right to counsel also includes the right to counsel of choice, provided the person seeking counsel has the resources to pay an attorney. United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974).

The government agrees that "[a] defendant is entitled only to counsel of choice whom he can afford." Justice Department Guidelines, 38 Cr.L. at 3002, citing United States

v. Rogers, 471 F. Supp. 847, 851 (E.D.N.Y. 1979). Consequently, the government contends that "the qualified right to counsel of choice ... (does not include) the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity." Justice Department Guidelines, 38 Cr.L. at 3002.

The defendants in the instant case, Mr. Bassett and Mr. Meredith, are apparently wealthy enough to hire counsel of choice. They are under indictment for their alleged participation in a continuing criminal enterprise. If it is determined that the money they pay their lawyers is forfeitable under the statute, then for all intents and purposes, despite their current wealth, they will be unable to hire counsel of choice. From the moment they walk through any law firm door, counsel inside are on notice, simply by virtue of the nature of the indictment, that any work done for these clients will be at least possibly done free. Even accepting, arguendo, the contention of the government that there is no right to use the proceeds of criminal activity to obtain counsel, at this point in time the funds of Mr. Bassett and Mr. Meredith cannot be ineluctably considered proceeds of criminal activity, because they have not yet been convicted of this crime. Although the "relation back" aspect of the forfeiture statute is only triggered by conviction, the practical effect is that if forfeiture is applied to attorneys' fees the true impact is felt prior to conviction. Despite the legal profession's commitment to pro bono work, it is doubtful that attorneys would be willing to invest the many hours of legal work necessary to defend against these serious charges without a more substantial hope of remuneration than the government is willing to concede.[5]

---

[5]The defendants' counsel in this case argue that should they agree to represent these defendants without an order from the court exempting their fees, they are essentially violating attorney ethics rules (Paper No. 416, Memorandum at 9). The Code of Professional Responsibility states, "A lawyer shall not enter into an arrangement for, charge, or collect

As stated by the court in the Badalamenti decision, if the statute applies to attorneys' fees, the message is

> "'Do not represent this defendant or you will lose your fee.' That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation. By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of the RICO and CCE statute (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business."

614 F. Supp. at 196.

The government suggests the defendants use non-forfeitable legitimate assets to pay their attorneys (Paper No. 437 at 13). This solution again presumes guilt before conviction -- no assets are forfeitable until the defendant is found guilty of the crime. As a practical matter, if the defendants are found guilty and their illicit assets are forfeitable, they are unlikely to have segregated their "good" assets from the tainted. Moreover, the government's solution is undercut by its own contention that once it obtains forfeiture, it need not "trace" the tainted money. This latter position is supported by case law. "It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known." United States v. Conner, 752 F.2d 566, 576 (11th Cir.), cert. denied, Taylor v. United States, 106 S.Ct. 72 (1985). Thus, this does not appear to be a realistic option.

The government also contends that the defendant may seek to have counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A. See United States v. Bello, 470

(FT. NOTE CONTINUED)
a contingent fee for representing a defendant in a criminal case." Md. Code of Prof. Resp., DR 2-106(c). The contingency here, of course, is that the lawyers will only get paid if the defendants are acquitted or convicted of a lesser charge.

Further, to continue representing these clients under these circumstances would also place these attorneys in conflict with the best interests of their client, they contend. Their "fees will be safe only in the event of an acquittal or a plea bargain that includes a Government promise not to seek forfeiture of fees." (Paper No. 416, Memorandum at 9). The advice they give their clients could be influenced by this fact.

F. Supp. 723, 725 (S.D.Cal. 1979). But the Rogers court said this was no more than "lip service to due process and the right to counsel." 602 F. Supp. at 1349. The court stated that the complexity of RICO cases would strain resources and probably be beyond the expertise of the already "overtaxed" federal public defenders' offices. Id. While this latter conclusion is probably overstated, it is true, as observed by the Badalamenti court, "[t]he wealthy defendant cannot claim poverty and apply for appointed counsel. His problem is not inability to pay a legal fee but that lawyers will refuse to accept his retainer and will refuse to represent him. He can get neither a paid lawyer, nor a free one." 614 F. Supp. at 197.

Finally, the Rogers court indicated that the government's interpretation of the forfeiture provision posed a serious threat to the adversary process. "The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses." 602 F. Supp. at 1350.

To read the statute as including in the forfeiture provision the fees of attorneys is to violate Sixth Amendment principles. Therefore, this court will follow the holdings of the Ianniello, Badalamenti, and Rogers decisions and determine that Congress did not intend the statute to encompass fees to attorneys paid for the legitimate rendering of professional services. Any attempt by a defendant simply to use an attorney to funnel or hide illicit funds outside of a legitimate fee arrangement for services rendered would, of course, not protect those funds from forfeiture. See Badalamenti, 614 F. Supp. at 198. There is no hint in this case that Mr. Bassett or Mr. Meredith are paying for anything other than legitimate lawyer services.

In reaching this decision, the court is not ignoring conflicting precedent established in this, or any other circuit. The Raimondo decision of the Fourth Circuit specifically left open the possibility of a challenge by the defense

lawyers to the forfeiture. Therefore, the court there did not examine any of the constitutional ramifications of construin the statute to include attorneys' fees. 721 F.2d at 478.[6] Additionally, Raimondo was decided before the forfeiture provisions were amended in 1984 and thus without the benefit of the legislative history on which this court has relied.

In the Third Circuit's Long decision, upholding a restraining order on the transfer of an airplane to the defense lawyer, the facts strongly suggest a sham transaction. The airplane was in payment of past debts for services and as a retainer for future expenses. The defendant and lawyer reached an oral agreement of $140,000 for the price of the plane. In exchange for the plane, the lawyer gave an unknown messenger $31,000 in cash to give to the defendant, credited the defendant with having paid $79,000 for future services and forgave $30,000 in defendant's unpaid legal debts. The defendant executed a power of attorney in favor of the attorney's law firm for the purpose of transferring title to the plane. Title was transferred to the attorney's partner by an individual named "Tony" in the Bahamas. The law firm then attempted to sell the plane through advertisements in trade magazines. Issuance of a restraining order stopped the sale. 654 F.2d at 913.

These facts, under the current statutes, might well be considered the substance of a sham transaction subject to forfeiture. Therefore, the Long decision cannot be read as undermining this court's ruling today.

Accordingly, it is this 11th day of April, 1986, by the United States District Court for the District of Maryland, ORDERED:

---

[6]In the Rello decision, a case decided in the Southern District of California, the court upheld a pretrial restraining order preventing the defendant under indictment for a RICO violation from disposing of certain assets. The defendant contended the order would render him unable to hire counsel. 470 F. Supp. at 724-25. The Rello court, like the Raimondo court, did not examine the potential Sixth Amendment problems. Instead, it merely concluded counsel could be appointed if the defendant had no money. Id. at 725.

1. That defendants' motion to exempt legal fees from forfeiture be, and the same is hereby, GRANTED.

2. That it is hereby DECLARED the government may not seek the forfeiture of legitimate attorneys' fees incurred and paid to Leslie Stein, Esq., attorney for Clarence Meredith, or Ronald Rubinstein, Esq., attorney for Ronald Bassett, for representation of said defendants against the charges set out in the indictment and superseding indictment in this case.

3. That the government is hereby ENJOINED from seeking the forfeiture of legitimate attorneys' fees incurred and paid to Leslie Stein, Esq., attorney for Clarence Meredith, or Ronald Rubinstein, Esq., attorney for Ronald Bassett, for representation of said defendants against the charges set out in the indictment and superseding indictment in this case.

4. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

James R. Miller, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 85-00010-A
	)	
CHRISTOPHER F. RECKMEYER, II, *et al.*	)	

(Caplin & Drysdale Chartered, Petitioner)

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED:

(1) that the Orders of Forfeiture of March 14, 1985, May 17, 1985, and June 5, 1985, are AMENDED to reflect that the firm of Caplin & Drysdale has a legal right, title, and interest in the sum $170,512.99 out of the forfeited assets of Christopher Reckmeyer;

(2) that the Clerk shall forward certified copies of this Order to all counsel of record.

Dated: 3/27/86
Alexandria, Virginia

United States District Judge

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 85-00010-A
	)	
CHRISTOPHER F. RECKMEYER, II,	)	
et al.	)	

MEMORANDUM OPINION

This matter is before the court on the Petition of the law firm of Caplin & Drysdale Chartered ("Caplin & Drysdale") who seek a modification of the forfeiture order entered by the court on May 17, 1985, to permit payment of defendant Christopher Reckmeyer's attorneys' fees. This case presents a conflict between the forfeiture of drug related assets under the Comprehensive Forfeiture Act of 1984 and a defendant's right to counsel under the Sixth Amendment to the Constitution. For the reasons set forth below, the Petition is granted.

I

The basic facts are not in dispute.

The law firm of Caplin & Drysdale began representing Christopher Reckmeyer in the summer of 1983, in connection with a grand jury investigation of drug trafficking activities in the Eastern District of Virginia which culminated in an indictment issued against Reckmeyer and twenty-five other individuals on January 15, 1985. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale $26,444.97 for services rendered and costs incurred through that date.

On January 14, 1985, this court issued an Order pursuant to an ex parte application by the government which restrained the transfer of assets by Reckmeyer and others. On January 25, 1985, Christopher Reckmeyer surrendered. At his request, Caplin & Drysdale continued to represent him in his defense of the indictment. On March 14, 1985, Christopher Reckmeyer plead guilty to Count 2--engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. He also

plead guilty to Counts 26 and 31, which charged violations of Federal tax laws.

On March 15, 1985, oral argument was held before Judge Bryan of this court on Reckmeyer's motion filed on March 7, 1985, for an order modifiying the restraining order of January 14, 1985, to exclude attorneys' fees from forfeiture. Judge Bryan denied this motion on March 15, 1985, on the ground that Reckmeyer had plead guilty to Count 2 on the previous day. Judge Bryan stated, however, that Caplin & Drysdale could, on its own behalf, raise the issue of forfeitability of attorneys' fees in the context of a third-party petition.

On May 17, 1985, Reckmeyer was sentenced to a period of incarceration, and a Forfeiture Order was entered listing virtually all assets possessed by Reckmeyer, including real estate, gems and $200,000 in United States currency. The Forfeiture Order specifically included:

> 29. All monies and funds restrained by January 14, 1985, restraining order entered in the above styled case, including but not limited to the approximately $25,000 held in escrow by Bernard S. Bailor [a member of the law firm of Caplin & Drysdale] and/or his agents.

Forfeiture Order dated 5/17/85.

In defending the charges against Reckmeyer, Caplin & Drysdale incurred the following expenses and time charges:

a. Disbursement for the retention of Stanley J. Reed of Lerch, Early, Roseman & Frankel to assist in Reckmeyer's defense. Mr. Reed was retained in order to comply with the requirements of Canon 6, ABA Code of Professional Responsibility because Caplin & Drysdale was not experienced in defense of drug cases. (Exhibit G.)	$ 46,975.54
b. Other disbursement in connection with the defense (duplicating, telephone, investigators, etc.) (Exhibit H).	$ 14,313.95
c. Caplin & Drysdale attorney time charges. (Exhibit H).	$109,223.50
Total Expenses	$170,512.99

In rendering these services to Reckmeyer, Caplin & Drysdale was a good faith provider of services for value. Caplin & Drysdale has

not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets. Pursuant to 21 U.S.C. § 853(n)(2), Caplin & Drysdale filed its Petition to the court for a hearing to adjudicate the validity of their interest in the forfeited assets.

II

Caplin & Drysdale argues that the forfeiture statute was not intended to reach legitimate attorney's fees, and therefore they are entitled to be paid the fees and costs incurred in representing Christopher Reckmeyer. They further argue that any construction of the forfeiture statute which reaches legitimate attorney's fees would violate a criminal defendant's Sixth Amendment Right to Counsel. The government argues that the attorneys only have standing to contest the forfeiture of $25,444.97 actually delivered to them by Reckmeyer but do not have standing to contest the balance owed by Reckmeyer. They further argue that the forfeiture statute can be plainly read to encompass attorney's fees and that the court should not order the government to pay the defendant's attorney of choice out of funds which rightly belong to the government under the relation-back principle of Section 853(c).

a. Standing

Under the Forfeiture Act, the disposition of third-party claims is governed by 21 U.S.C. § 853(n)(6). This section provides:

> (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--
>
> > (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

The government argues that petitioners do not have standing to contest the Order of Forfeiture under Section 853(n)(6). The government position is that petitioners cannot claim either a superior right, title or interest "at the time of the commission of the acts which gave rise to the forfeiture," 21 U.S.C. § 853(n)(6)(A), or that they are "bona fide purchaser[s] for value" who were "reasonably without cause to believe that the property was subject to forfeiture," 21 U.S.C. § 853(n)(6)(B).

The legislative history of the criminal forfeiture statute provides: "Third parties who assert claims to criminally forfeited property, which in essence are challenges to the validity of the order of forfeiture, are entitled to a judicial determination of their claim." S. Rep. No. 225, 98th Cong., 1st. Sess. 208 (1983). It is clear from the Senate Report that petitioners' claims fall within the scope of persons which Congress recognized as being "entitled to a judicial determination of their claim," even though they cannot specifically make a claim for relief under Section 853(n)(6). The court having found petitioners to be a good faith provider of services, it follows that they have a legal interest in the property forfeited. Their status is, at least, equal to that of a general creditor, and therefore the court finds that they do have standing to present their claims.[1]

---

[1] This ruling is consistent with the court's ruling on the Petition of William Reckmeyer in which it held that Section 853(n)(6)(A) provided standing for all general creditors to make claims which may rebut the government's presumption of forfeitability under Section 853(d). See Memorandum Opinion dated February 5, 1986, at 13. The only difference here, is that the petitioners are challenging the reach of the entire forfeiture statute as it applies to attorney's fees and not the forfeitability of property under a particular section of the statute. (CONTINUED)

b. Sixth Amendment

The court having found that the petitioners have standing, the question before the court is whether counsel fees and costs are exempt from forfeiture under the Comprehensive porfeiture Act of 1984, 21 U.S.C. § 853.

Four other district courts have addressed this issue, albeit in a pretrial context. In United States v. Rogers, 602 F. Supp. 1332 (D. Col. Feb. 22, 1985), the government filed a petition for an order restraining transfer of property by defendants under an indictment alleging forfeiture under the Comprehensive Forfeiture Act of 1984. The court held that attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions. In In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F. Supp. 839 (S.D.N.Y. March 11, 1985), the court refused to quash a government subpoena seeking information regarding defense counsel's fee arrangement with defendant in order to obtain information regarding potentially forfeitable assets. In addressing the question of forfeitability, the court, specificly declining to follow Rogers, held that the government is entitled to a preliminary order restraining attorney's fees under the Comprehensive Forfeiture Act. In United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. July 10, 1985), the court, in ruling on a defendant's motion to quash a trial subpoena duces tecum served upon defense counsel, held that the government may not seek a special verdict as to the forfeiture of attorney's fees under 18 U.S.C. § 1963 or 21 U.S.C. § 853 and may not rely on forfeiture in support of the subpoena at issue. Finally, in

(FT NOTE CONTINUES)

The court would also further note that counsel in its representation of William Reckmeyer did raise this issue before Judge Bryan of this court in the form of a motion for modification of the ex parte protective order obtained by the government. At that time, Judge Bryan told counsel they could present their claims in the form of a third-party petition under Section 853(n). In light of these facts, the court thinks it would be unfair to not give petitioners standing at this time to hear their claims.

United States v. Ianniello, 85 Cr. 115 (S.D.N.Y. Sept. 3, 1985) (slip op.) the defendants sought and obtained an order declaring that attorneys' fees are exempt from forfeiture under 18 U.S.C. § 1963.[2]

This court agrees with the reasoning of the Rogers, Badalamenti, and Ianniello courts, and does not believe that Congress intended that the Comprehensive Forfeiture Act of 1984 would encompass bona fide legal fees paid to a criminal defendant's attorney. Such an application of the Act would in all likelihood violate the Sixth Amendment while not furthering any Congressionally desired ends of the statute. Absent some clear indication in the statute or legislative history that Congress did address this issue, it seems inconceivable that they intended the Forfeiture Act to be applied in this manner.

As the court noted in Badalamenti, a literal reading of Section 853 would seem to encompass legal fees. Section 853(a) provides that any person convicted of a violation of the federal drug laws shall forfeit "any property" which constitutes a proceed or was used to facilitate the criminal activity or, in the case of a person engaging in a continuing criminal enterprise, "any of his interest in, claims against, and property or contractual rights affording a source of control over" the enterprise. 21 U.S.C. § 853(a) (emphasis supplied). The statute does not specifically exempt counsel fees. The legislative history of the statute does, however, touch on this issue. The House Judiciary Committee Report states:

> Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case.

---

[2] 18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853.

H.R. Rep. No. 845, pt. 1 98th Cong., 2nd Sess. 19 n.1 (1984). This passage, appears to modify the broad language in the statute so that it will not be read as a Congressional affirmation that forfeiture of attorney's fees is constitutionally permissible. It appears that Congress did not intend to take a position regarding the forfeitability of attorney's fees through this legislation, but rather decided to leave the resolution of this issue to the courts. In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F. Supp. at 849-50 n.14. The broad language of the Section 853(a), which speaks in terms of "any property" of the defendant, should not therefore be read as a Congressional statement that attorney's fees in a criminal case are subject to forfeiture under this Act. This court's finding that the forfeiture of attorney's fees violates the Sixth Amendment is therefore not inconsistent with the Congressional intent behind the Comprehensive Forfeiture Act, it appearing that it was Congress' intent all along that the courts would resolve this question.

The application of Section 853 to encompass bona fide attorney's fees would violate a defendant's Sixth Amendment rights in two ways. First, it would violate the defendant's right to obtain counsel of his choice. Powell v. Alabama, 287 U.S. 45, 53 (1932); United States v. Inmann, 483 F.2d 738 (4th Cir. 1973) (Sixth Amendment includes right to reasonable opportunity to obtain, and be represented by an attorney of one's choosing where defendant can do so from his own resources). Second, it would create inherent conflicts of interest between the attorney and his client, and would chill the free flow of information between attorney and client, resulting in a deprivation of the defendant's right to effective assistance of counsel. See Strickland v. Washington, 104 S.Ct. 2052 (1984); United States v. Ianniello, slip op. at 12-13; United States v. Rogers, 602 F. Supp. at 1349.

It cannot be disputed that the application of the third-party forfeiture provisions to attorneys' fees will

restrict a defendant's ability to obtain counsel of choice. See Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim. L. Rep. (BNA) 3001, 3002 (Oct. 2, 1985). Indeed, the notice provisions of Section 853(n)(6)(B) and the "relation-back" doctrine of Section 853(c), as construed and applied by the government, will deprive a defendant of counsel of choice no less effectively than if the government simply prohibited a defendant from hiring a lawyer. Attorneys will not represent a defendant if they know that, upon his conviction, their fees will be subject to forfeiture or that, as in the instant case, due to a restraining order, they cannot be compensated for legal services rendered prior to and including trial, and are later prohibited from asserting an interest in fees which otherwise would have been paid.

The right to obtain counsel of one's choosing is not absolute, but "must be carefully balanced against the public's interest in the orderly administration of justice." Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981). See also United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978) (counsel of choice may only be deprived where compelling need to assure prompt effective and efficient administration of justice); United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983) (prosecution must show important interest adversly affected by permitting chosen counsel to proceed).

In this court's opinion, there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their "economic bases" upon conviction. See S. Rep. 98-225 at 191; see also Russello v. United States, 104 S. Ct. 296, 299 (1983). The relation-back provision of Section 853(c) authorizes the court to set aside illusory or fraudulent transfers so that a defendant cannot, prior to conviction, avoid forfeiture by transferring assets to a nominee. See S. Rep. 98-225 at 209 n.47. Exempting legitimate attorney's fees from

forfeiture would not undermine these purposes because "[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham." United States v. Rogers, 602 F. Supp. at 1348, and therefore a defendant who is found guilty will still be separated completely from his economic base.

Subjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice. The forfeiture of attorney's fees would likely cause chosen counsel to withdraw, leading to delays, disruption of the criminal proceeding, and further creating serious problems for already overburdened public defenders. It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since that Act places limits on the amount which can be paid as attorney's fees.[3] Finally, subjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is "on notice." Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable. See United States v. Rogers, supra, 602 F. Supp. at 1350 (application of forfeiture provisions to attorney's fees violates due process because: "The government would possess the ultimate tactical advantage of being able to exclude competent

---

[3] The availability of court-appointed counsel under the CJA is also inadequate because, due to threat of forfeiture of attorney's fees, individuals would be deprived of the opportunity to obtain any legal representation before they are officially charged or rendered "financially unable" to hire their own counsel. Thus, during the pendency of a grand jury investigation, a defendant, who is not only presumed innocent but has not even been charged with a crime, could not obtain the advice of counsel on such matters as whether to assert his Fifth Amendment rights.

defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries"). Ultimately, therefore, forfeiture of attorney's fees would undermine the adversary system itself, by producing an imbalance of powers that would violate the due process clause of the Fifth Amendment. See Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser"); Gandy v. Alabama, 569 F.2d 1318, 1321 (5th Cir. 1978) (defendant's due process protection includes "fair opportunity to be represented by counsel of his own choice").

As the court stated in Badalamenti, the denial of choice of counsel is only the beginning of the problems that the government's position would raise. The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. See Strickland v. Washington, 104 S. Ct. 2052 (1984); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir.) cert. denied 451 U.S. 938 (1981).

Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity; the attorney's obligation to negotiate a guilty plea which is in his client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture; the attorney's desire to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture" would conflict with his obligation to maintain his client's confidences. United States v. Badalamenti, 614 F. Supp. 194, 196-197 (S.D.N.Y. 1985).

The possibility of an attorney appearing as a third-party petitioner in a Section 853(n) hearing also undermines the attorney-client relationship, further impinging on the right to counsel. The threat of an attorney having to disclose information obtained from his client will chill the openness of attorney-client communications. Rogers, 602 F. Supp. at 1349. If an attorney advised his client of the possible ramifications of the disclosure of this information to him, the free flow of information would be even further chilled depriving the defendant of effective representation. Ianniello, slip op. at 12-13.

In summary, the court finds that the Comprehensive Forfeiture Act does not encompass the forfeiture of bona fide attorney's fees of the defendant. Such a construction of the statute would violate the Sixth Amendment, and is not contrary to the legislative intent of Congress. Having already found that Caplin & Drysdale was a good faith provider of services for a value of $170,512.99, the court will direct the government to pay Caplin & Drysdale $170,512.99 out of the forfeited assets of Christopher Reckmeyer.

An appropriate Order will issue.

Dated: 3/27/86
Alexandria, Virginia

United States District Judge

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 13, 1986

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Federal Public/Community
Defender Organizations
District Court Executives
Clerks of Courts
Chief Probation/Pretrial
Services Officers
Senior Staff Attorneys
Librarians

Subject: Gramm-Rudman-Hollings

On March 11-12, 1986, the Judicial Conference of the United States approved actions recommended by its Executive Committee, to meet the requirements of the Balanced Budget and Emergency Deficit Reduction Act of 1985, otherwise known as the Gramm-Rudman-Hollings Act. The actions taken by the Conference are attached for your information.

The schedule of reductions contained in Appendix A is effective immediately. The Chief Justice will appoint a committee to receive and review requests for emergency exceptions to these requirements.

The Judicial Conference also approved the proposals contained in Appendix B. Action to implement these proposals will be initiated immediately. Some will require legislation.

Requests for emergency exceptions to the items listed below should be addressed to the circuit council. If the council approves, the request should then be addressed to the committee appointed by the Chief Justice.

— APPENDIX C —

SCHEDULE FOR THE REDUCTION OF EXPENDITURES
($000)

Appropriation Title	Potential Savings FY 1981
Defender Services	
1. Reduction in budgetary authority of Public Defender offices and Community Defender organizations by reason of lapses (vacancies), deferral of furniture and equipment acquisitions, CALR, travel, and delay in establishing new offices.	1,850
2. Reduce the amount approved for compensation for panel attorneys appointed during the remainder of the fiscal year by 10 percent of the amount billed.	1,800
3. Reduction in rates for extra copies of transcripts furnished court-appointed attorneys in multi-defendant criminal cases from 50 cents to 25 cents per page up to 1,000 pages and 10 cents per page in excess of 1,000 pages. (The Committee to implement the Criminal Justice Act should reconsider the matter of apportionment of the cost of transcripts with United States Attorneys).	400
4. Decrease the number of appointments to panel attorneys and increase the appointments to Public Defender offices and Community Defender organizations where cost effective and practicable.	—
5. Give closer scrutiny to CJA vouchers, determinations concerning financial eligibility for the appointment of counsel, determinations concerning the appropriateness of issuing reimbursement orders under subsection (f) of the Act and decisions concerning the appointment of counsel in discretionary matters under subsection (g) of the Act.	—
Total Savings	4,050

American Bar Association

GOVERNMENTAL AFFAIRS OFFICE ABA.net 140
DIRECTOR
Robert D. Evans
ABA.net 136
STAFF DIRECTOR FOR GOVERNMENTAL LIAISON
Craig H. Baab
ABA.net 185
STAFF DIRECTOR FOR BAR LIAISON
Kevin J. Driscoll
STAFF DIRECTOR FOR MEMBER LIAISON
Ilene R. Emselem
LEGISLATIVE COORDINATORS
Lilian B. Gaskin
Denise A. Cardman
Maurice A. Barboza
STAFF DIRECTOR FOR INFORMATION SERVICES
Sharon Greene
ABA.net 284
EDITOR
WASHINGTON LETTER
Rhonda J. McMillion

June 3, 1986

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of May 13 transmitting a number of questions to the American Bar Association witnesses, Messrs. Elliot L. Richardson and William W. Taylor III, that arose as a result of the Committee's May 13 hearing on attorney fee forfeiture. The ABA very much appreciated the opportunity to discuss this important subject.

Messrs. Richardson's and Taylor's responses are as follows:

1. Q. You stated in your written remarks that fees received by attorneys should only be forfeited when there are reasonable grounds to believe that an attorney has engaged in criminal conduct or where the attorney has accepted a fee as a fraud or sham to protect a client's alleged illegal activity. Are there any other circumstances in which you believe forfeiture is acceptable?

A. No. We do not believe that it is possible to create the potential for forfeiture without making the attorney's fee contingent upon his success. Because contingent fees in criminal cases are prohibited by the Model Rules of Professional Conduct, and because they would create conflicts of interest for the attorney, we do not believe that forfeiture is acceptable except where the attorney has engaged in criminal conduct or where the attorney has accepted a fee as a fraud or sham.

GOVERNMENTAL AFFAIRS OFFICE
1800 M STREET, N.W., WASHINGTON, DC 20036-5886 • WRITER'S DIRECT NUMBER

2. Q. If the government obtains a restraining order prohibiting a defendant from transferring assets, and the defendant is unable to retain counsel, isn't it constitutionally acceptable for the court to assign appointed counsel to represent a narcotics or racketeering defendant if the court appointed counsel can provide effective assistance of counsel?

A. No. As we stated in our testimony, there is no right to appointed counsel prior to indictment. In any event, citizens have the right to retain counsel and depriving them of that ability prior to adjudication of their guilt imposes punishment prior to trial in violation of the Due Process Clause.

3. Q. What practical effect does forfeiture have on a defense attorney's representation if it is possible that a paid retainer fee could be forfeited by the government at some time in the future?

A. The practical effect of a potential fee forfeiture is to prevent defense counsel from accepting the representation.

4. Q. What practical effect does subpoenaing a criminal defense attorney to appear before a federal grand jury have on the attorney-client privilege? What information do you believe can be disclosed by a defense attorney without violating the attorney-client privilege?

A. The practical effect of subpoenaing criminal defense attorneys before a federal grand jury is well documented in the attached article by Professor Genego, which was cited in our testimony at page 7.

5. Q. What evidence is there that qualified defense counsel are refusing to accept representation when forfeiture is a possibility?

A. The evidence that qualified defense counsel are refusing to accept representation when forfeiture is a possibility is also contained in Professor Genego's article. That article demonstrates that, in fact, qualified criminal defense attorneys are not accepting representation in those cases.

6. Q. Does a criminal defendant have a constitutional right to counsel of his choice?

A. Yes.

7. Q. If a narcotics client retains an attorney with $100,000 cash in small, brown grocery bags, what steps, if any, should the defense attorney take to determine if the cash fee was generated by illicit narcotics activity?

A. Under these circumstances, it would appear that the money has evidentiary significance. If it does, the attorney would, by accepting it, probably become a witness in the government's effort to prove that the defendant received "substantial income." By accepting the money and depositing it, the attorney might also run afoul of the holding of In re Ryder, 381 F.2d 713 (4th Circ. 1967) affirming 263 F. Supp. 360 (E.D. Va. 1967).

The ABA appreciates the opportunity to respond to these questions, and we hope that you will call on us if we can be of any assistance to you as you consider this issue.

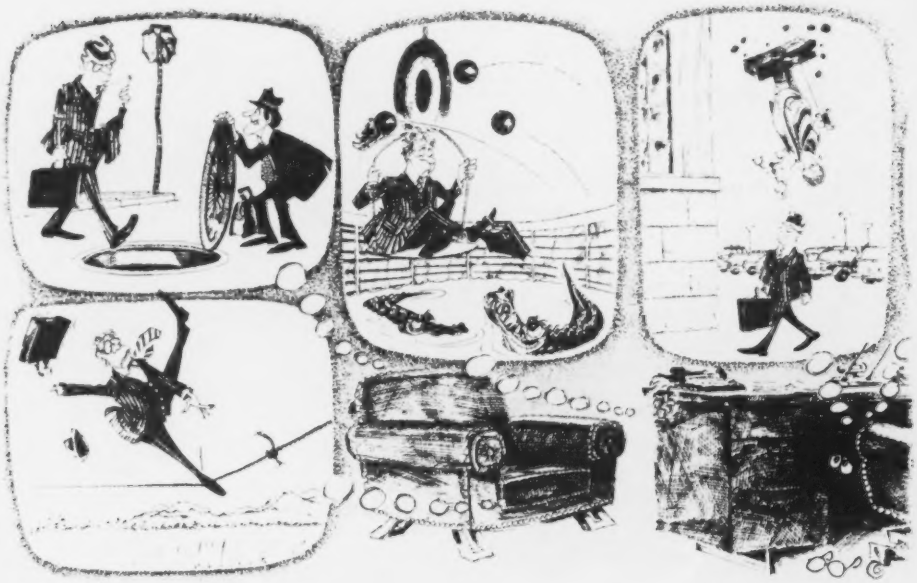
Sincerely,

Kevin J. Driscoll

KJD/jet

0116M

BY WILLIAM J. GENEGO



The government and the defense attorney

Risky Business: The Hazards of Being A Criminal Defense Lawyer©

A survey reveals how governmental practices may be injurious to your health

Copyright © 1986, William J. Genego. all rights reserved

A heated debate has emerged over claims that federal prosecutors are regularly engaged in practices that interfere with rights of criminal defendants to obtain legal representation. Defense attorneys claim that prosecutors are using a variety of investigative techniques to discourage zealous representation by defense attorneys and to prevent particular attorneys from representing specific clients. See, e.g., Tarlow "Federal Prosecutors Step Up Attacks on Defense Lawyers," *Forum*, July-August, 1985, and "Targeting Lawyers," *The National Law Journal*, January 21, 1985, p 1. Defense attorneys also assert that these practices are not fulfilling a legitimate need to obtain evidence. For example, they claim that prosecutors direct grand

Herb Brammerer

jury subpoenas and IRS summonses to attorneys seeking information about their clients, even though that information is available from other sources. The attorney is then put in the position of providing information to be used against the client, creating a conflict and preventing the attorney from any further representation of the client.

The techniques prosecutors are using—grand jury subpoenas, IRS summons processes, actions seeking forfeiture of legal fees, disqualification motions, unknown, cooperating government witnesses in multi-defendant case meetings, and attempts to entrap attorneys through "clients" who are in fact working with the government—are seen by the defense bar as part of a general prosecutorial program to target vigorous and successful attorneys for government harassment and to discourage attorneys from representing criminal defendants.

In response, government attorneys argue that the challenged practices are used only for legitimate investigatory and prosecutorial reasons and maintain that they employ valid legal procedures, made available to them by Congress and courts. They deny that they are targeting criminal defense lawyers or attempting to interfere with defendants' right to counsel. Further, the prosecutors insist that such practices are not widespread and are selectively utilized in appropriate circumstances. See, e.g., "The Defense Bar: On the Defensive," *The National Law Journal*, December 1985, p. 3; "Has U.S. Put Lawyers on the Defensive," *The Los Angeles Times*, June 14, 1985, p. 1, col. 1.

This controversy is now playing itself out in both the courts and Congress. When federal prosecutors attempt to obtain information from defense attorneys by subpoenas and summonses, or to forfeit their legal fees, defense attorneys have responded by claiming that these efforts violate the defendant's Sixth Amendment right to counsel. See, e.g., *In re Doe*, ____ F.2d ____ (2d Cir. 1986 en banc); *United States v. (under seal)* Garber, ____ F.2d ____ (4th Cir. 1986); *In re Klein*, ____ F.2d ____ (7th Cir. 1985); *In re Grand Jury Matters*, 751 F.2d 73 (1st Cir. 1984); *United States v. Ianniello*, 621 F. Supp. 1455 (S.D.N.Y. 1985); *United States v. Baldalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Payden*, 605 F. Supp. 839 (S.D.N.Y. 1985) *rev'd on other ground* 767 F.2d 26 (2d Cir. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985). Defense attorneys have also asked both Congress and the courts to take remedial action to prohibit or police these prosecutorial practices. For example, federal legislation has recently been introduced to exempt attorneys' fees from forfeiture. Further, the Massachusetts Supreme Judicial Court has declared that it is unprofessional conduct for the government to subpoena an attorney to provide information concerning a client without prior judicial approval. See Massachusetts Supreme Judicial Court, Rule 3.08, Prosecution Function 15 (1986).

Critical to this debate is the need to know how often prosecutors use such practices and what effect, if any, they have upon criminal defense representation. In May and June of 1985, I surveyed by mail, through written questionnaire, all of the members of the National Association of Criminal Defense Lawyers (NACDL) to obtain information about prosecutorial practices which may affect criminal defense attorneys and the attorney-client relationship. The questionnaire was intended to document the experiences of individual criminal defense attorneys, to elicit their perceptions of specific prosecutorial practices and to inquire of the effect, if any, such experiences and/or perceptions were having upon their criminal defense practice. (See "Collecting the Data," accompanying this article, for more information on how the survey was conducted.)

Are the practices prevalent?

In general, the prosecutorial practices examined by the questionnaire are reported to be widespread, and the responses indicate a dramatic rise in the government's use of these practices in the last 30 months. Moreover, specific characteristics of an attorney's practice increased the likelihood that he or she reported having been the subject of any of the practices identified. Finally, the responses indicate that the government practices surveyed have had a substantial impact upon the professional behavior of criminal defense attorneys: 46 percent of the attorneys responding indicated they had made at least some changes in their practice.

The percentage of the attorneys who responded that they had been subjected to the practices identified are reported in Table 1.

Time proved to be a relevant factor. For those attorneys who indicated that they had been the subject of a particular practice, the questionnaire asked when the event had

occurred. These results are indicated in Table 2. These figures indicate a dramatic rise in the government's use of these practices during the 30-month period (1983 to mid 1985) prior to the survey. The responses also suggest that prior to 1980 these practices were relatively infrequent.

The reported extent of the prosecution practices also varied according to the characteristics of the attorney. While all types of attorneys reported that they had been the subject of all of the practices identified, several factors could be identified that increase the likelihood of such an occurrence. The attorneys who reported the most frequent instances of being subjected to the prosecutorial practices were those engaged in private practice, handling white collar or drug cases, those who had been practising criminal defense the longest, and those who had made the most money.

For example, with respect to grand jury subpoenas, while 18 percent of the attorneys overall responded that they had received a grand jury subpoena, 32 percent of those attorneys whose practice consisted of 50 percent or more white collar crime cases reported that they had received a grand jury subpoena, and 24 percent of those attorneys whose practice consisted of half or more drug cases reported having received grand jury subpoenas, while only 9 percent of the attorneys whose practice consisted of half or more cases involving crimes against property or individuals reported receiving a grand jury subpoena (see Table 3).

To determine what effect, if any, the government's practices have had upon criminal defense attorneys, three questions were asked:

(1) whether the respondent had ever decided not to accept a criminal case based upon a concern that it might result in a government examination or investigation of the respondent or a challenge to the fee to be paid (and if so, when this had occurred);

(2) whether the respondent had ever decided not to take a particular action in his or her representation of a client based upon a concern that it might result in a government examination or investigation of his or her practice (and if so, when this had occurred); and

(3) whether the government's use

Table 1
ATTORNEYS REPORTING THEY HAD BEEN THE SUBJECT OF THE PRACTICES

*Prosecutorial Practice**	*Attorneys Who Reported Being Subject to Practice*	
	%	(Raw number of respondents)
Grand Jury Subpoena	18%	(294)
IRS Summons	11%	(178)
Confidential Informant in Multi-defendant Cases	40%	(640)
Fee Questioned	21%	(348)
Disqualification Sought	26%	(430)

*The questions asked concerning each of these practices are reproduced in Appendix A. Overall, 1,103 of the respondents reported having been subject to one or more of these practices, representing 66 percent of the total respondents.

Table 2
TIME PERIOD DURING WHICH EVENT OCCURRED*

Prosecutorial Practice	*N (total # of events)*	*Distribution Over Time*			
		1983–1985	*1980–1982*	*1975–1979*	*1974 or Before*
Grand Jury Subpoena	(294)	68%	18%	11%	4%
IRS Summons	(178)	56%	22%	12%	9%
Confidential Informant in Multi-defendant Cases	(640)	68%	17%	8%	7%
Fee Questioned	(348)	84%	11%	2%	3%
Disqualification Sought	(430)	72%	17%	10%	2%

*A bias exists in reporting events over time because more recently experienced events are remembered more vividly and are thus more likely to be remembered. However, the nonuniform distribution of the different practices over time as reported here suggest that this bias was minimal in the survey results.

William J. Genego *is a professor at the University of Southern California Law Center. The article is based upon his research, which is also discussed in "Fear in the Adversary System," forthcoming 1986.* *The research for this article was funded by a grant from the University of Southern California Law Center Research Fund.*

of the practices identified had resulted in the attorney making changes generally in the methods or procedures of his or her practice.

According to the responses received, the reported government use of the identified prosecutorial practices has had a marked impact upon attorneys' practice of criminal defense.

Forty-six percent of the attorneys responded that they had made some change in their practice of criminal defense based on the government's activities. Of the 731 attorneys who reported that they had made changes in their practice, 60 percent (or 438) had been the subject of one or more

Collecting the Data

The NACDL is the single largest membership organization of criminal defense lawyers in the United States. Its objective, as stated in its bylaws, is to "promote the proper administration of criminal justice" and to "concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedure."

The members of the NACDL may represent a population more likely to have been affected by the practices examined than lawyers in general. I chose this sample population because the object of the survey was to obtain data about the incidence and possible effects of specified prosecutorial practices on criminal defense representation. The membership of the NACDL presented an efficient means of obtaining such information.

A total of 4,024 questionnaires (representing the total number of members of the NACDL as of May, 1985) were mailed in late May and early June, 1985. Seventy-four were returned without delivery. Of the 3,950 questionnaires delivered, 1,648 were returned, a response rate of 42 percent. The likelihood that an attorney would respond to the questionnaire was probably greater if he or she had been the subject of one or more of the practices examined. While this might introduce a bias in the results of the survey, even if it is assumed that everyone who did not return the survey had not been affected by or subject to any of the practices, given the high rate of incidences and effects of the practices, the reported results are still significant.

The questionnaire was 15 pages in length and asked four types of questions. The first series of questions asked respondents to indicate the percent of their practice devoted to criminal cases; the percent of their criminal cases which were federal versus vs. state criminal prosecutions; the percent of their criminal practice devoted to various types of offenses (white collar, drug, offenses against individuals and property, and other offenses); and, finally, the percent of the criminal cases handled by the attorney in which he or she had been privately retained versus appointed by the court. In addition, the respondents were asked the number of years they had been in practice; the number of years they had been practising criminal defense; their age; and their approximate annual income.

A second set of questions asked respondents whether they believed that either the Department of Justice or individual United States Attorneys' offices had intentionally adopted a practice of investigating or prosecuting attorneys who represent defendants in criminal cases as a means of inhibiting and discouraging zealous representation of criminal defendants (and, if so, when they believed such a practice had been adopted). These questions about the respondents' beliefs were asked second to reduce the potential bias in the answers that might have here occurred from the effects of ordering if the questions were asked after the questions concerning the respondents' individual experiences.

The third set of questions asked for information about a variety of specified prosecutorial practices. For each of the practices identified, the questionnaire asked whether a respondent had either been the subject of the particular action (and if so, when it had occurred and in what jurisdiction) and whether the respondent personally knew an attorney who had been subjected to the practice identified (and if so, when it occurred and in what jurisdiction). Among the specific practices inquired about were the receipt of grand jury subpoenas; the receipt of summonses from the Internal Revenue Service; the government's use of confidential informants at defense meetings involving multi-defendant representation; attempts to forfeit money paid attorneys or to prevent a defendant from using his or her assets to pay attorneys' fees; and efforts to disqualify an attorney from representing a particular defendant.

The fourth and final set of questions sought information about the effect of these practices. The three questions are asked under the heading, "What is the effect?", which appears elsewhere in this article.

Table 3
INCIDENCE OF PRACTICES ACCORDING TO ATTORNEYS' CASELOAD

Prosecutorial Practice	*Composition of Attorneys' Caseload*		
	White Collar Offenses 50–100% of Practice	*Drug Offenses 50–100% of Practice*	*Offenses Against Individuals & Property 50–100% of Practice*
Grand Jury Subpoena	32% (48/150)*	24% (106/444)	9% (63/669)
IRS Summons	19% (29/150)	12% (52/443)	6% (40/673)
Confidential Informant in Multi-defendant Cases	45% (66/146)	41% (179/438)	30% (200/668)
Fee Questioned	25% (38/149)	28% (122/440)	14% (92/667)
Disqualification Sought	38% (56/147)	33% (143/436)	18% (120/668)

*Reported as % (number of attorneys subject to practice/number of attorneys in group responding)

Table 4
INCIDENCE OF PRACTICES ACCORDING TO NUMBER OF YEARS IN CRIMINAL DEFENSE

Prosecutorial Practice	*Attorneys Who Reported Being Subject to Practices According to Years of Criminal Defense Representation*			
	10+ yrs	*6–10 yrs*	*3–5 yrs*	*1–2 yrs*
Grand Jury Subpoena	26% (199/774)*	14% (64/454)	9% (29/332)	3% (2/71)
IRS Summons	17% (134/778)	7% (31/456)	3% (10/331)	4% (3/71)
Confidential Informant in Multi-defendant Cases	46% (353/763)	34% (153/453)	37% (121/330)	17% (12/71)
Fee Questioned	25% (189/770)	18% (84/455)	21% (69/328)	8% (6/70)
Disqualification Sought	32% (247/772)	26% (116/452)	18% (59/327)	11% (8/71)

*Reported as % (number of attorneys subject to practice/number of attorneys in group responding)

Table 5
INCIDENCE OF PRACTICES ACCORDING TO INCOME

Prosecutorial Practice	*Attorney's Income (by thousands)*				
	1–30	*31–75*	*76–100*	*100–200*	*200 +*
Grand Jury Subpoenas	3%* (7/201)	12% (78/659)	23% (66/293)	29% (95/330)	37% (43/116)
IRS Summons	2% (5/202)	6% (39/660)	13% (39/294)	18% (61/331)	26% (30/116)
Confidential Informant in Multi-defendant Cases	26% (53/201)	33% (214/652)	42% (124/292)	51% (164/325)	59% (68/115)
Fee Questioned	12% (25/201)	17% (113/656)	21% (61/291)	31% (103/327)	34% (39/116)
Disqualification Sought	12% (25/201)	21% (140/658)	28% (83/292)	38% (123/325)	43% (49/115)

*Reported as % (number of attorneys subject to practice/number of attorneys in group responding)

of the practices identified. The attorneys who most frequently reported that they had made changes in their practice were attorneys who predominantly handled white collar or drug offenses and those who had the highest incomes. These figures are recorded in Tables 6 and 7.

Thirty-one percent of the attorneys responded that their evaluation of whether to take a particular action on behalf of a client had been affected. Virtually all attorneys who reported that their evaluation of actions had been affected reported that this was so only within the last four years. (See Table 8.)

Fourteen percent of the attorneys responded that they had decided not to accept a specific criminal case or cases. Of those attorneys who had decided not to accept a case, virtually all had done so within the last 30 months. No attorney reported not taking a case based on a concern of government actions prior to 1974. The distribution over time of such decisions is recorded in Table 9.

How does the defense bar view their experiences?

The responses to the survey also provide information about the respondents' views of the government's activities and the individual experiences of the respondents.

When asked "Do you believe the Department of Justice has intentionally adopted a practice of investigating and prosecuting attorneys who represent defendants in criminal cases as a means of inhibiting and discouraging zealous representation of criminal defendants?", 80 percent of the respondents (1,182 attorneys) reported they had such a belief. Of this group, 86 percent had been the subject of one or more practices identified by the questionnaire. The respondents' view as to when this practice was adopted is recorded in Table 10.

Some of the attorneys supplemented their responses to the survey by providing written comments about their individual experiences. Thirty-one percent of the attorneys reported that their evaluation of what they believed to be legitimate defense actions had been affected by a concern that taking the action might result in a retaliatory government investigation. Specific actions cited in their comments included not interviewing witnesses and not defending clients' interests in government efforts to forfeit assets.

In addition, attorneys reported that they had been placed in a conflict of interest position with their clients as a result of various prosecutorial activities. At least three attorneys reported that they had been presented with plea bargain offers for their clients which implicated their own fees: if a client pleaded guilty, the prosecution would not seek forfeiture of the attorney's fee, but if the client insisted on going to trial, the money used to pay the attorney's fee would be subject to forfeiture if a conviction was obtained.

As noted above, a substantial number of attorneys (46 percent) reported that they had self-consciously made changes in their criminal defense practice as a result of the prosecution's increased use of the practices identified by the survey. These attorneys repeatedly stated that they also were less open and more guarded in advising clients because they feared their advice might be misinterpreted and used against them by a client who might later decide to cooperate with the government.

At least eleven attorneys reported specific instances of having been approached by purported witnesses or potential clients who were working for the government and who, in their disguised capacity, attempted to engage the attorney in misconduct. Thirty-three attorneys also reported that they do not keep any records or keep fewer records because of a concern that the government will subpoena the records, which would then put the attorney in the position of providing information against his or her client. One-hundred-eighteen attorneys reported that they kept far more detailed records, and 24 attor-

(Continued on page 39)

Table 6

ATTORNEYS REPORTING CHANGES IN PRACTICE ACCORDING TO ATTORNEYS' CASELOAD

Composition of Attorney's Caseload		
White Collar Offenses 50–100% of Practice	*Drug Offenses 50–100% of Practice*	*Offenses Against Individuals & Property 50–100% of Practice*
50%* (73/146)	55% (234/427)	34% (220/649)

*Reported as % (number of attorneys reporting changes/number of attorneys in group)

Table 7

ATTORNEYS REPORTING CHANGES IN PRACTICE ACCORDING TO ATTORNEYS' INCOME

Attorneys Income (by thousands)				
1–30	*31–75*	*76–100*	*100–200*	*200 +*
26%* (52/198)	41% (266/642)	49% (142/286)	57% (181/320)	65% (74/114)

*Reported as % (number of attorneys reporting changes/number of attorneys in group)

and digested. The examinations of the arresting officer, the chemical test technician, and any adverse lay witnesses must be planned carefully and thoroughly in order to ferret out untruths, inaccuracies, inconsistencies, unfairness, or bias.

Demonstrative evidence

Although most of the work during the pretrial phase of drunk driving defense is mundane and pedantic, requiring meticulous attention to detail, there is also great room for creativity. New defenses should be analyzed. Demonstrative evidence, ranging from the high-heeled shoes that may have caused the client to perform poorly on field tests, to the contact lenses that may have made the client's eyes red and watery, or the whiskey glasses from which he consumed alcohol, may prove to be an effective defense tool. Charts, graphs, models and mark-ups can also be used to illustrate and clarify difficult scientific concepts. A more detailed discussion of "The Use of the Demonstrative Evidence to Defend a Drunk Driving Case" can be found in the December 1984 *Practical Lawyer*.

Demonstrative evidence may also help make up for the attorney's own shortcomings. Not every attorney can take charge of a courtroom. Not every attorney has a great trial presence. Not every attorney is as eloquent as Clarence Darrow. Demonstrative evidence can make up for these deficiencies. See Tarantino, "Litigating With Legends," *Rhode Island Bar Journal* (May 1985).

Advocacy and attitude

The attorney who defends the drinking driver should do everything possible to believe in some aspect of the case. It may be that the police officer either lied about the client's performance on field sobriety tests, or was, at least in some way, mistaken. The blood, breath or urine test may be inaccurate. A constitutional right or safeguard may have been violated. Most importantly, the client may not be guilty.

The attorney must maintain a positive attitude, but not an unrealistic one. False hope leads to certain convictions. Drunk driving cases are not easy; in most cases, the prosecution will win. Although that result will please neither the client nor the defense attorney, it is far more acceptable than losing the case through inadvertence, neglect, or incompetence.

The drunk driving defense attorney's conduct will be in the spotlight. He must maintain professional standards in representing the alleged drunk driver in either plea negotiations or trial. He will be judged by those standards, and any shortcomings may lead to a successful petition for post-conviction relief. See *Arnold v. State*, 685 P. 2d 1261 (Alas. App. 1984).

Whoever the client may be, and whatever the potential defense, the attorney handling drunk driving cases should start to correct the injustices in our current criminal justice system. The Constitution protects all criminal defendants, including drinking drivers. Scientific uncertainty cannot be legislated away; it must be recognized, confronted and, to the extent possible, made certain. Drunk driving defendants cannot be deprived of the right to fair trial. Fundamental fairness must replace the current "ends justifies the means" philosophy. The "human carnage" exception to the Constitution must be abandoned. Victims of drunk drivers must be compensated for their losses, and those who are guilty of drunk driving must be punished—but not at the expense of constitutional rights.

If all of this means less convictions on drunk driving charges, so be it. No one is in favor of drunk driving. The courts, the prosecutors and the defense attorneys must, however, all support and demand a fair, impartial and workable criminal justice system for all criminal defendants, even the unpopular drinking driver; otherwise we will soon have no "justice" left in the criminal justice system.

Winston Churchill once said, "A quality of a nation can best be judged by the quality of its justice." In the area of drunk driving, both our criminal justice system and our nation are experiencing serious quality control problems. Those problems must be addressed and solved to insure fairness to both the victims of drunk driving conduct and the drinking driver as well. **CJ**

Risky Business

(Continued from page 7)

neys reported requiring clients to sign agreements or contracts stating that the money used to pay the attorney's fee was not in any way associated with or tainted by criminal activity.

A second reported effect is deterrence. The 14 percent of the defense attorneys surveyed who said that they have refused to handle at least one criminal case did so based on a concern that defending the case might result in an investigation that would affect their legal practice or that the government might attempt to forfeit their fee. Twenty-nine of these attorneys stated that they had decided to take fewer criminal cases, while 16 others reported that they had decided to end their federal criminal practices completely. Those ending their practices indicated that the risk of a government investigation, the time required to respond to such an investigation, and its possible effect on their reputations in the community, made criminal practice undesirable and too costly.

The importance of the findings

The survey data support several general conclusions. First, a significant number of criminal defense attorneys report having been subjected

to the prosecutorial practices examined by the survey. Second, the respondents report that since 1980 the prosecution's use of such practices has dramatically increased. Defense attorneys report a consistent increase in the practices over time, and further, for the most recent time period, 1983 to mid-1985, the use of these practices has jumped enormously. Third, the likelihood of being subjected to the practices varies significantly with the type of cases handled, the number of years practicing criminal defense, and the amount of money earned. These variables suggest that the attorneys who are the most experienced and the most successful (as measured by income) are the most likely to be subject to these practices.

Do these data indicate that the government has adopted a policy of investigating and harassing criminal defense attorneys as a means of discouraging zealous advocacy? When asked this question, 80 percent of the respondents reported that they believed this to be true. While the data might be seen as supporting such a conclusion, the survey cannot, of course, establish that such a policy has been intentionally adopted by the Department of Justice.

The reported increase in certain prosecutorial practices could be explained by a variety of other factors. Congressional, court and prosecutorial decisions may all have had an effect. For example, statutory changes in the criminal code have occurred in the last several years. In 1984, at the request of the Department of Justice, Congress adopted for the first time a "relation back" provision to the criminal forfeiture of assets in the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c). Under the relation back concept, the government's interest in money or other property that is derived from criminal activity (and is thus subject to forfeiture) vests when the crime has been committed and is not affected by a subsequent transfer. This provision has made it much easier for prosecutors to seek the forfeiture of attorneys' fees.

Similarly, Supreme Court interpretations have had an impact. In 1984, the Court held that the disqualification of an attorney in a criminal case is not appealable pretrial. See *Flanagan v. United States*, ___ U.S. ___, 104 S.Ct. 1051 (1984).

This decision makes it far more attractive for a prosecutor to seek disqualification of defense counsel: it removes the possibility that the prosecution will be delayed by a pretrial appeal of the disqualification issue; and it means the disqualification issue will be subject to a harmless error standard of review on appeal. Similarly, judicial rulings narrowly interpreting the attorney-client privilege, and thus upholding the right of the government to obtain information from attorneys through grand jury subpoenas and IRS summonses, have made it more likely that prosecutors will be able to utilize successfully such procedures. See e.g., *In re Ousterhoudt*, 722 F.2d 591 (9th Cir. 1983).

The recent use of certain practices might be seen as a consequence of the government's decision to concentrate its prosecutorial resources on certain kinds of offenses. The complex nature of many white collar and drug offenses, which commonly involve the control and transfer of assets and other recorded events — in particular offenses charged under the Racketeer Influenced and Corrupt Organization statute (18 U.S.C. § 1962) and Continuing Criminal Enterprise offenses (21 U.S.C. § 848) — make it more likely that relevant evidence will be in the hands of attorneys.

The reported increase in prosecutorial use of these practices may also be a function of prosecutors changing their views. As government prosecutors face numbers of well-to-do

Table 8
WHEN EVALUATION OF ACTIONS EFFECTED OCCURRED

Effect of Prosecution Practice	*Number of attorneys reporting evaluation of actions affected*	*Distribution Over Time*			
		1983-85	*1980-82*	*1975-79*	*1974 & before*
Evaluation of actions affected:	497 (31% of total respondents)	87%	8%	3%	2%

Table 9
WHEN DECISION NOT TO TAKE A CASE OCCURRED

Effect of Prosecutorial Practice	*Number of attorneys deciding not to take on a case*	*Distribution Over Time*			
		1983-85	*1980-82*	*1975-79*	*1974 & before*
Decided not to take a case:	230 (14% of total respondents)	95%	3%	2%	0%

defendants represented by aggressive and skilled attorneys, prosecutors may well be responding by employing tactics to disarm the adversary. An obvious target is the defendant's most powerful weapon — the attorney in charge of the defense. By preventing defense counsel from handling particular cases, or by causing the attorney to focus on challenging the legality of subpoenas and the like, the prosecution is often able to undermine the defense effort. Prosecutors and other government agents may have come to perceive these tactics as acceptable, and even efficient, means to obtain information about a defendant and to increase the prosecution's likelihood of obtaining a conviction.

The question of whether the government intentionally has adopted a policy of using the practices identified to discourage zealous advocacy by criminal defense attorneys is, however, beside the point. What is important is that the practices are in fact used, their use is widespread, and they have already had an effect on the professional behavior of criminal defense attorneys.

An appropriate response

This survey documents that, even if unintentionally, the government is chilling the relationship between client and lawyer, and the government is causing attorneys to be less aggressive out of fear of antagonizing prosecutors who can jeopardize their welfare. In some instances, the government also is making the defendant's choice of counsel unavailable. That these effects are widespread and, as this survey has shown, have already had a profound impact on the practice of criminal defense, has important implications for the adversary system. This impact has, and will, impede the proper functioning of the adversary process by affecting one side's ability to prepare and present its case on the merits.

Rather than being able to singly devote himself or herself to the defense of the client, the attorney must first be concerned with his or her own welfare; possible selective retaliation by the prosecution, and spending defense resources on collateral issues relating to the attorney's ability to continue to represent his or her client. This impedes the proper functioning of the adversary process. While the government should not be deprived of its ability to gather all relevant and unprivileged evidence of criminal activity, and should not be hampered in its legitimate enforcement of the law, the fulfillment of these interests should not come at the expense of harming appropriate defense advocacy.

The question that must be addressed is how can the sense of fear and intimidation experienced by the criminal defense bar be diminished without depriving the prosecution of its ability to gather legitimately evidence of criminal wrongdoing.

The essential aspect of the prosecutorial practices which gives rise to these concerns, and the resulting effect on defense representation, is their discretionary nature. For example, the decision to issue a grand jury subpoena or IRS summons to an attorney, or an action taken to forfeit an attorney's fee, are discretionary decisions made solely by the prosecution. It is this discretionary power, which is practically unreviewable, that creates an imbalance in the adversary process and results in a chilling effect on defense representation.

This imbalance must be addressed by policing the prosecution's use of practices which impact directly upon the criminal defense attorney. Voluntary, internal guidelines adopted by the government to govern the use of such practices do not fulfill this function; they are not enforceable, and, therefore, do not provide the defense with actual protection. The courts and Congress must ensure that defense attorneys are not subject to unfair harassment and intimidation by the government.

Careful policing of the prosecution's use of such practices runs counter to the traditional deference courts provide the prosecution in such matters, and to the substantial barriers courts have established in defense of claims of prosecutorial bad faith. See, e.g., *United States v. Goodwin*, 457 U.S. 368 (1982).

To ensure, however, that the integrity and proper functioning of the adversary process is not distorted, courts must be willing to carefully scrutinize prosecution practices which impact on the defense attorney and the attorney-client relationship. This requires that courts recognize the impact such practices, individually and collectively, have upon the Sixth Amendment rights of defendants.

Similarly, Congress must modify current legislation or adopt new measures which restrict the prosecution's ability to use potentially neutral practices in a manner that restricts defense advocacy and interferes with defendants' Sixth Amendment rights. Until the courts and Congress are willing to provide meaningful safeguards governing such practices, defense representation and the adversary process will be compromised.

Appendix A

1 (Ka) Have you ever been subpoenaed to appear before a grand jury to provide testimony or to produce documents related to your fees and/or billing records on your representation of a client?

A yes _____

B no _____

Table 10

WHEN PRACTICE ADOPTED

No. of Attorneys Who Believe Practice Adopted	Distribution Over Time: 1981-85	1980-82	1975-79	1974 & earlier
1,182	41%	41%	9%	9%

Report to Members

The CHAIRMAN. Now, Mr. Sonnett, could you give us the thrust of your statement in about 3 minutes and put your entire statement in the record?

STATEMENT OF NEAL R. SONNETT, THIRD VICE PRESIDENT AND LEGISLATIVE CHAIRPERSON, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, DC

Mr. SONNETT. Yes; I would be pleased to do that, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. SONNETT. I recognize the time constraints on this committee. We have submitted on behalf of the National Association of Criminal Defense Lawyers a lengthy written statement, and that, I know, will be made a part of the record.

I want to direct myself, then, very briefly to what I believe are the problems that have generated this hearing, and that is the use of the comprehensive forfeiture amendments to seek forfeiture of attorneys' fees, which we believe strikes at the very heart of the adversary system and which, in our view, will have a very far-reaching effect on the right of an accused to counsel and to a fair trial and, indeed, may very well mean the end of the retained criminal bar and the adversary system of justice as we know it.

Let me point out to you, Mr. Chairman, that the issue has arisen because of what we think is the Department of Justice's overly expansive view of the relation-back doctrine. While there is no statutory definition within the CFA as it presently has been written and passed, the Senate report and the legislative history, we think, is instructive with respect to its application.

The clear purpose of that provision, even recognized by the Department in Mr. Trott's written submission, is to permit the voiding of preconviction transfers to close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not arm's-length transactions.

Then the Senate report instructed:

> This provision should be construed to deny relief to third parties acting as nominees as the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in the bill.

The purpose was never, in my view, to permit the Government to raise revenue. The purpose of the CFA was not to deprive honest third parties who deal in ethical, legal transactions of the funds or assets that they have gotten for the goods sold or services rendered.

Nor was the purpose of the CFA to regulate the conduct of attorneys, although we certainly agree with the findings of the President's Commission on Organized Crime that with respect to that very small group of lawyers, some action can be taken.

Indeed, we agree with the American Bar Association's position that not all attorneys' fees require an exemption from forfeiture, but those that are the subject of a sham or artifice ought to be subject to forfeiture.

Indeed, in my view, those lawyers who engage in those tactics ought to be subject to full, criminal prosecution. The legitimate interest, if you will, Mr. Chairman, of the Government is satisfied at

the time of conviction when the convicted defendant is deprived of his assets.

In any other scheme, allowing forfeiture of attorneys' fees places the lawyer in an absolutely imponderable and unsolvable ethical dilemma. Allowing such forfeiture places the attorney in the position of being a witness against his own client. It creates a contingency fee relationship, which violates the canons of ethics. It creates circumstances in which an attorney has an impermissible, pecuniary interest in the outcome of the litigation, and it creates a situation in which the lawyer may fun afoul of his ethical responsibilities to give independent advice solely for the benefit of his client.

Let me tell you momentarily, Mr. Chairman, about a case that I was counsel in, because I think it illustrates the problems that lawyers are faced with under the current view of the Department of Justice.

William Sheehan was indicted in Fresno, CA, in November 1984, and for 7 or 8 months thereafter I was forced to engage in collateral litigation dealing with the subject of forfeitability of attorneys' fees.

I received a grand jury subpoena to testify before a grand jury. The indictment which was returned against Mr. Sheehan alleged forfeiture of my attorneys' fees. I was given a trial subpoena to testify at the trial of my client, and a grand jury subpoena was given to my bookkeeper for an appearance even postindictment.

Immediately, I was placed in an insufferable position, but so was my client. He was so distrustful of what was happening that he then refused to engage in full and frank discussions with me.

When I went to him wit' advice that he should enter a plea of guilty based upon plea negotiations with the government, he was concerned about whether my advice was in his best interests or perhaps was in my own.

Even when I was in the position of attempting to render advice in his best interests, he was not able to have full faith and confidence in me; 18 months later, even after plea, conviction, and sentencing of Mr. Sheehan, the Department of Justice has still not determined whether or not they will seek forfeiture of my fees.

Mr. Chairman, in summary, we believe that it is not necessary to create a special exemption for lawyers, and we do not believe that the framing of the question in that regard by the Department of Justice is the proper focus.

What we suggest is that this committee follow the legislative history of the Confidential Forfeiture Act and attempt to precisely define in the statute the meaning of the relation-back theory as it deals with third party transferees, and that the committee take action to ensure that with respect to the relation-back doctrine, it applies only to those transactions that are part of a sham, or an artifice, or where assets are taken, or moneys received to further the criminal activity of the client.

Then you are not talking about an exception for lawyers. You are talking about proper application of this doctrine of forfeitability that was intended by this committee.

The CHAIRMAN. Thank you very much. We appreciate your appearance. Would you mind answering a few questions for the record? You can send the answers back to us.

Mr. SONNETT. I would be pleased to do so, Senator.

The CHAIRMAN. This is a very important hearing and we are anxious to get the views of the different witnesses. We regret that today is an unusual day with so many demands on the Senators.

Thank you for your appearance. Your entire statement will go in the record.

Mr. SONNETT. Thank you for the privilege of allowing me to appear.

[The prepared statement and responses to questions follow:]

National Association of Criminal Defense Lawyers

STATEMENT OF

NEAL R. SONNETT

THIRD VICE-PRESIDENT AND

LEGISLATIVE CHAIRPERSON

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

FORFEITURE OF ATTORNEYS' FEES AND RELATED ISSUES

MAY 13, 1986

SUITE 550 • 1815 H STREET NORTHWEST • WASHINGTON, DC 20006
(202) 872-8688

Mr. Chairman and distinguished members of the Committee, I am deeply appreciative of the opportunity to present testimony today, on behalf of the National Association of Criminal Defense Lawyers, on the question of forfeiture of attorneys' fees and related issues such as subpoenas to defense counsel for information relating to the representation of a client.

My name is Neal R. Sonnett, and I am a senior partner in the Miami, Florida law firm of Bierman, Sonnett, Shohat & Sale, P.A., specializing in the defense of federal criminal cases. I am also currently an Adjunct Professor of Law in Advanced Federal Criminal Procedure at the University of Miami School of Law. Between 1967 and 1972, I served as an Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. In addition to serving as a Vice-President of NACDL, I also serve this year as President of the National Caucus of Metropolitan Bar Leaders of the American Bar Association, which represents the leadership of the 42 largest local bar associations in the United States. I am the immediate Past President of the Florida Criminal Defense Attorneys Association and a Past President of the Dade County Bar Association.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of over 4,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. NACDL is specifically dedicated to promoting the proper administration of criminal justice.

NACDL was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout its history, the NACDL has worked to protect the rights and liberties of those accused of criminal offenses. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

Introduction

The NACDL recognizes that drug trafficking and racketeering are serious problems that tear at the very fabric of our society. Our members are good citizens as well as officers of the court, and our ethical obligation to protect the constitutional rights of the accused to a fair trial does not diminish our collective outrage over organized criminal activity.

We agree, as was stated in this Committee's report on the Comprehensive Forfeiture Act of 1984 (S.Rep. No. 98-225, at 191), that "[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." We therefore believe that passage of the Act, as well as other provisions of the Comprehensive Crime Control Act of 1984, represents a commendable effort to establish stronger and more effective ways of dealing with this national cancer.

We believe, however, that very serious problems are raised by the use of the Comprehensive Forfeiture Act to seek forfeiture of attorneys' fees, and by the related practice of issuing subpoenas to defense lawyers to obtain evidence against their clients. Thses practices threaten to upset the traditional adversarial balance in our criminal justice system, jeopardize the most fundamental rights of individuals accused of criminal offenses, and may well mean an end to the private criminal defense bar as we know it.

Developments within and without the criminal defense bar

NACDL's Lawyers' Assistance Strike Force: The significance of these issues, and the depth of concern about them among the organized bar, cannot be overestimated. Obviously, they are of great concern to the membership of NACDL. One of our most valued and widely used services is the NACDL Lawyers' Assistance Strike Force--a nationwide network of criminal defense lawyers standing ready to provide immediate and experienced legal assistance to other criminal defense lawyers who find their ability to practice affected by actions of the Government such as fee forfeiture and attorney subpoenas.

Genego Study: The precise nature and extent of these practices, and the criminal defense bar's reaction to them, is no longer a matter of speculation or doubt. Empirical evidence has now been compiled, through a study conducted by Professor William Genego at the University of Southern California Law Center. (A copy of an article by Professor Genego describing the results of the study, to be published in this month's issue of NACDL's magazine, The Champion, is attached to this testimony as Appendix No. 1). Among the study's findings: approximately one-fifth of the criminal defense practitioners responding have been subjected to fee forfeiture attempts, grand jury subpoenas, or motions to disqualify. The vast majority of these incidents have occurred within the last two years. Prosecutors are most likely to target the most experienced and successful attorneys (measured in terms both of years of practice and income level). And almost half the respondents have changed the way they practice law in reponse to the Government's practices, with 14 percent deciding to no longer accept certain kinds of criminal cases.

The bar at large: Elements of the bar other than criminal defense practitioners have been quick to recognize the threat to the right to counsel generally, the adversarial balance, the confidentiality of attorney-client communications, and the potential chilling effect on the free exchange of information between attorney and client. The House of Delegates of the American Bar Association--composed overwhelmingly of non-criminal-defense practitioners--has adopted resolutions opposing the Justice Department's practices on both fee forfeiture and subpoenas to defense counsel. And just last month, at a meeting at the Harvard Law School, representatives of a broad range of bar interests--from legal aid and public defender groups, to immigration lawyers and administrative practitioners before agencies such as the SEC and the IRS--joined together to establish an unprecedented nationwide organization, called the National Network for the Right to Counsel, to preserve and protect the adversarial balance for individuals requiring representation in every area of law.

The President's Commission on Organized Crime: The seriousness of these concerns has been explicitly recognized from the law enforcement as well as the defense perspective. For example, many current state and former Federal prosecutors have actively criticized the Justice Department's practices, at a recent Conference on Defending the Right to Counsel, held at the Harvard Law School prefatory to the establishment of the National Network for the Right to Counsel.

But even more recently, the President's Commission on Organized Crime, in its final report issued April 1, 1986, acknowledged substantial problems with the prosecutorial use of fee forfeiture and subpoenas to defense counsel. While expressing understandable zeal for cracking down on "mob-connected" lawyers who actively aid and abet criminal activity, the Commission nevertheless recognized, at page 32 of the section on "Lawyers and Organized Crime," that:

> A troubling issue arises when prosecutors attempt to subpoena lawyers to get information about the fees

> paid to them. . . . [T]he evidence obtained is probative of the defendant's, and not the lawyer's wrongdoing. . . . [T]he tactic may have an impact on general attorney-client privilege and on Sixth Amendment concerns.

The Commission suggested that there should be an across-the-board requirement of judicial approval for every such subpoena, such that, in the interests of safeguarding the defendant's rights, the subpoenas would be enforceable only where the prosecution can "demonstrate to the court that the evidence sought is relevant and that the potential impact on the defendant's Sixth Amendment rights is outweighed by the prosecution's need for the information." The substance of this recommendation is roughly comparable to portions of an internal Justice Department guideline governing issuance of subpoenas to attorneys for information relating to the representation of clients (U.S. Attorneys Manual 9-2.161(a)). However, where the Commission speaks of review by the court, the Department speaks only of in-house review by the Assistant Attorney General of the Criminal Division, and takes pains to point out that, in any event, the guidelines are totally unenforceable "by any party in any matter."

With regard to forfeiture of attorneys' fees, the Commission tempered its strong support for forfeiture generally with a discussion of the concerns that have arisen in the fee forfeiture area. "As this report is written," the Commission stated (at page 34), "the Sixth Amendment ramifications of the forfeiture statute are uncertain." More specifically, the Commission declared that: "Requiring defense attorneys to have an affirmative duty to inquire into the source of their fees is a difficult issue that raises basic questions regarding the right to counsel."

Forfeiture of attorneys' fees

The statute and legislative history: The Comprehensive Forfeiture Act of 1984 wrought extensive substantive and procedural changes in the implementation of criminal forfeitures. See generally, Reed, "Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes," 22 Am. Crim. L. Rev. 747, 750 (1984). The Act broadened the applicability of in personam forfeitures to include any felony offense involving controlled substances, and extended the definition of forfeitable "interests" by providing a more elaborate description of the types of property subject to criminal forfeiture, invoking the so-called "relation-back" doctrine (which had previously been confined to civil forfeitures), and by establishing a "rebuttable presumption" of forfeitability with respect to certain property owned by defendants.

The current efforts by the Justice Department to seek forfeiture of attorneys' fees is based primarily upon the "relation-back" theory and the following statutory language:

> Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. 853(c) (governing Continuing Criminal Enterprise prosecutions, such as in large-scale drug cases). (Substantially identical provisions, enacted simultaneously in the Comprehensive

Forfeiture Act of 1984, govern RICO prosecutions, under 18 U.S.C. 1963(c)).

We believe it is clear that these provisions were neither designed nor intended to reach attorneys' fees for legal services legitimately rendered. Our position is supported by five of the seven U.S. District Courts which have directly considered the issue: United States v. Rogers, 602 F.Supp. 1332 (D. Colo. 1985); U.S. v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y. 1985); U.S. v. Iannello, S 85 Cr. 115 (S.D.N.Y., September 3, 1985); U.S. v. Reckmeyer, Cr. no. 85-00010-A (E.D. Va., March 27, 1986) (appeal pending); U.S. v. Bassett, Cr. no. M-85-0541 (D. Md., April 11, 1986). Copies of the latter three unreported decisions are attached to this testimony for the Committee's convenience, as attachments 2, 3, and 4. Contra: U.S. v. Thier, Cr. no. 85-4857 (D. La. 1986) (pretrial restraining order) (appeal pending); In re Grand Jury Subpoena (Simels), No. M-11-188 (S.D.N.Y., March 11, 1985) (dicta), rev'd on other grounds, No. 85-6066 (2d Cir., June 27, 1985).

The Act itself says nothing about forfeiture of attorneys' fees. This much the Justice Department acknowledges. See "Justice Department Guidelines on Forfeiture of Attorneys' Fees," U.S. Attorneys' Manual 9-111.000 et seq. (38 Cr. L. Rep. 3001, 3003).

The legislative history is ambiguous. The House came closest to addressing the issue specifically, when it stated, in a House Judiciary Committee report explaining the restraining order provisions of the House's version of the Comprehensive Forfeiture Act, that: "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H. Rep. 98-834 Part 1, at 19, n. 1.

The apparent clarity of this statement, however, is somewhat clouded by the House report's immediate subsequent pronouncement that: "The Committee, therefore, does not resolve the conflict in district court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." The district courts have generally interpreted the combined effect of these statements to suggest that Congress intended simply to leave the question to the courts. U.S. v. Payden, 605 F.Supp. 839, 849, n.14 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985); U.S. v. Reckmeyer, supra, at 9; In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F.Supp. at 849-50 n.14.

It is worth noting that the qualifying language of the second sentence of the House footnote has also been said to be totally irrelevant outside of the context of a pretrial restraining order. U.S. v. Badalamenti, supra at 197.

The Senate materials make no specific mention of Sixth Amendment or attorney-client issues, but they do contain some illuminating discussions of the general purposes of the forfeiture provisions. The Senate report explains that:

> The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could not be avoided by transfers that were not "arms' length" transactions.

S. Rep. no. 98-225, at 200-01. What are these "certain" transfers? As the Committee stated in the portion of the report discussing the hearing procedures for protection of third party rights:

> The provision should be construed to deny relief to third parties **acting as nominees** of the defendant or who have knowingly engaged in **sham or fraudulent**

> **transactions.** The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. 1963(c), as amended by the Bill.

Id. at 209 n.47 (emphasis added). It is this language which has served as the basis for the prevailing "sham or fraud" standard adopted by each of the district courts which have ruled against forfeiture of attorneys' fees. It is a standard set by the seminal Rogers case, and expressly followed by each succeeding decision:

> An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered.

602 F.Supp. at 1348. See Iannello, supra, at 8-9 ("bona fide attorneys' fees paid to defense counsel who serve the defendants' need within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture.")

In this regard, comment must be made upon the Justice Department's argument, in its guidelines, 38 Cr. L. Rep. at 3002, that a footnote in the Senate report evidences the Senate's intention that attorneys' fees be forfeitable. See S. Rep. no. 98-225, at 200 n. 28, citing U.S. v. Long, 654 F.2d 911 (3rd Cir. 1981). In fact, the Long case was cited only in general support of the need for the relation-back doctrine. The facts of the case clearly suggest a sham transaction (transfer of a $140,000 airplane to the attorney's partner through an individual named "Tony" in the Bahamas, primarily for "future services"). U.S. v. Bassett, supra at 24-25; U.S. v. Rogers, supra at 1350. Thus, this Committee's reference to the Long case is entirely consistent with the holdings of Rogers and its progeny.

One other vital provision of this Committee's report is instructive here--the general statement that the purpose of the Act is to strip racketeers and drug dealers of the "economic power bases" generated by their criminal activities. S. Rep. no. 98-225 at 191. See also Russello v. U.S., 104 S. Ct. 296,299 (1983).

The forfeiture of bona fide attorneys' fees does nothing to advance this goal. A defendant who has been convicted and stripped of all proceeds of his crimes other than attorneys' fees has no greater illicit "economic power base," not a penny more of ill-gotten gains, than a convicted defendant whose attorneys' fees have been forfeited. The only additional thing the latter defendant has been stripped of is his constitutional right to the effective assistance of counsel, and to counsel of his own choosing. As the Reckmeyer court stated, at 11, "a defendant who is found guilty will still be separated from his economic base."

Although this Committee's report is rife with general discussion inconsistent with the forfeiture of bona fide attorneys' fees, nothing is quite so plain as the fact that the issue was simply never considered. If it had been, it is utterly inconceivable that the Committee would have failed to address it explicitly--given the obvious significant constitutional and ethical problems involved. And each of the courts which have ruled against fee forfeiture have indicated that even if the hasty and meager legislative history could somehow be massaged to support the forfeiture of bona fide attorneys' fees, they would be required to hold such an application of the statute unconstitutional.

See, e.g., U.S. v. Badalamenti, supra at 198 ("And if the statute were so intended, I would be forced to concluded that in this application it ran afoul of the Sixth Amendment by effectively preventing the accused from exercising the right to counsel."); U.S. v. Bassett, supra at 23.

Constitutional, policy and ethical considerations: A defendant's Sixth Amendment right to counsel encompasses the right to employ the attorney of his or her own choice. U.S. v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979). The rule is well established that "[a]n accused who is financially able to retain counsel must not be deprived of the opportunity to do so." Id.; Linton v. Perini, 656 F.2d 207, 208 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). This right may be denied a defendant only in order to vindicate a compelling need to assure prompt, effective and efficient administration of justice. U.S. v. Burton, supra at 488-89.

The Justice Department concedes, in its guidelines, at 38 Crim. L. Rep. 3002, that its fee forfeiture policy will restrict a defendant's ability to obtain counsel of choice. As noted by the Reckmeyer court, at page 10:

> Indeed, [Justice Department practices] will deprive a defendant of counsel of choice no less effectively than if the government simply prohibited a defendant from hiring a lawyer. Attorneys will not represent a defendant if they know that, upon his conviction, their fees will be subject to forfeiture or that, as in the instant case, due to a restraining order, they cannot be compensated for legal services rendered prior to and including trial, and are later prohibited from asserting an interest in fees which otherwise would have been paid.

And what compelling governmental interest is there to justify the abridgment of this constitutional right? Certainly not the Senate's stated goal of stripping the defendant of his "economic power bases;" as noted earlier, this occurs regardless of whether the attorney's fees are forfeited. Indeed, it may be said, as the Reckmeyer court stated, id., not only that "there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorneys' fees," but also, as that court stated, that:

> Subjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice. The forfeiture of attorney's fees would likely cause chosen counsel to withdraw, leading to delays, disruption of the criminal proceeding, and further creating serious problems for already overburdened public defenders.

Accord, U.S. v. Rogers, supra at 1349-50 ("The government brings to bear significant resources to prosecute these cases. Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. It is not consistent with due process to create a situation which eliminates the adversary from the adversary process.").

Additionally, there is a problem not just with the qualified right to counsel of choice, but also with the Sixth Amendment's absolute right to counsel. The Justice Department likes to assert that a defendant denied counsel of choice can always fall back on counsel appointed under the Criminal Justice Act. But in fact, in cases where there is no pretrial restraining order--only the threat of fee forfeiture or inclusion of a fee

forfeiture count in the indictment--a defendant otherwise able to pay retained counsel simply could not qualify for appointed counsel: until he were actually convicted and his assets forfeited, he could not truthfully make the necessary declaration that he is "financially unable" to retain counsel. U.S. v. Badalamenti, supra at 197-98 ("The problem is the unlikelihood of obtaining a lawyer **at all** [emphasis in the original];" concluding with the politically unpopular but constitutionally vital notion that "the right to counsel belongs to guilty defendants as well as innocent ones."). Furthermore, even if appointed counsel were available, it is "doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since that Act places limits [$40 per hour on out-of-court work and $60 per hour on in-court work] on the amount which can be paid as attorney's fees." U.S. v. Reckmeyer, supra at 11-12.

Other factors implicating the Sixth Amendment's absolute guarantee of the effective assistance of counsel are the many inherent conflicts of interest and ethical problems which would arise between attorney and client, chilling the necessary free flow of information between them. Id., at 9. There is the prohibition, under Code of Professional Responsibility DR 2-106(c) against contingent fees in criminal cases: retention of the lawyer's fee would depend upon gaining an acquittal in the client's trial. There is the pecuniary conflict, between the attorney's obligation to negotiate a guilty plea which is in the client's best interest, and the attorney's desire to tailor a plea that does not involve fee forfeiture. There is the conflict between the attorney's obligation to be well informed about the client's case and the attorney's interest in not learning facts that would endanger his fee by suggesting that he was not "reasonably without cause to believe" that the fee payment was the proceeds of criminal activity.

Beyond the Sixth Amendment, the practice of fee forfeiture runs afoul of other significant constitutional rights as well. First and foremost, there is the presumption of innocence, comprehended within the Fifth and Fourteenth Amendments. U.S. v. Reckmeyer, supra at 12 n.3 ("during the pendency of a grand jury investigation, a defendant, who is not only presumed innocent but has not even been charged with a crime, could not obtain the advice of counsel on such matters as whether to assert his Fifth Amendment rights.").

And of course, central to the notion of Fifth Amendment due process is the "balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474 (1973). Attorney fee forfeiture confers upon the government "the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries. . . . Due process cannot tolerate even the opportunity for such abuse of the adversary system." U.S. v. Rogers, supra at 1350.

Subpoenas to defense counsel

Such due process principles are further offended by the Justice Department's practice of issuing subpoenas to defense counsel for information relating to the representation of a client--such as fee information pursuant to a fee forfeiture count--even in the absence of any suggestion that the attorney has committed any offense more culpable than providing the bona fide legal representation to which the client is constitutionally entitled. See "Policy With Regard to the Issuance of Subpoenas to Attorneys for Information Relating to the Representation of Clients," U.S. Attorneys' Manual 9-2.161. As Newsweek Magazine pointed out on April 21, 1986:

> Federal prosecutors have discovered an amazing new source for incriminating evidence: defense attorneys. Since August the U.S. Department of Justice has issued 245 subpoenas against lawyers across the country, roughly 30 per month, ordering them to turn over information about clients.

There is often a misconception about the effectiveness of the attorney-client privilege in guarding against the compelled disclosure of information which may be inimical to the client's interests. Unfortunately, the protection is quite limited; the privilege does not apply to all incriminating information. For example, courts have held it not to apply to documents given by the client to the attorney, to information about the size and source of the attorney's fee, or to information about the identity of the client, even where disclosure of the client's identity would provide the last link in the evidence necessary to indict the client. In re Grand Jury Investigation (Durant), 723 F.2d 447 (6th Cir. 1983).

The central problem with attorney subpoenas is that when an attorney is compelled to appear as a witness in a case involving a client, a conflict of interest arises between the attorney (who must obey the law and comply with the subpoena) and the client. And when it does, the attorney is generally required to be disqualified from further representing that client. (Code of Professional Responsibility DR5-102(B) provides that, where a lawyer believes that he may be called as a witness against a client, he may continue the representation "until it is apparent that his testimony is or may be prejudicial to his client.") Thus, the prosecutor, simply by issuing a subpoena, can bring about the removal of the accused's chosen lawyer--sometimes described as a "prosecutor's veto."

All this is possible, under current law, by the Justice Department acting unilaterally--without the need for court supervision, review or intervention. And without the safeguard of prior court review to avoid the "fishing expedition" syndrome, inevitable problems arise with the breadth of the subpoenas. In one Massachusetts case last summer, a grand jury subpoena was issued for every single client file of a group of immigration lawyers working in a legal services agency. In re Grand Jury Subpoena (Legal Services Center), M.D.B. No. 85-34-F. In another case, a subpoena was issued for every piece of information held by a Wall Street law firm on a business client who was under investigation for business fraud. In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983 (2d Cir., March 27, 1984).

In one case in Boston, a respected and principled attorney named Barry Wilson spent four and a half months in Federal prison for civil contempt for refusing to turn over information he claimed was privileged and protected by the Sixth Amendment. In re Grand Jury Proceedings, 760 F.2d 26 (1st Cir. 1985).

The effect of these practices, of course, is to send an ever-louder signal to the users of legal services in this country that they can no longer count on secrets told to lawyers staying secret anymore. This is commonly called a "chilling effect." See, e.g., U.S. v. Reckmeyer, supra at 14; U.S. v. Rogers, supra at 1349. One U.S. District Court judge, lambasting prosecutors for harassing five defense attorneys with subpoenas aimed a fee arrangements, called it an "arctic effect . . . freezing criminal defense attorneys into inanimate ice flows, bereft of the succor of constitutional safeguards." In re Grand Jury Matters, 593 F.Supp. 103, 107, affirmed, 751 F.2d 13 (1st Cir. 1985).

Let me also speak personally, Mr. Chairman, about my own experience with such subpoenas. Last year I was retained as

counsel immediately after arrest in a CCE case in Fresno, California. U.S. v. Sheehan and Groh, Case no. CR F NO. 84-198 REC (E.D. Cal.). The indictment contained an attorney fee forfeiture count, pursuant to which a subpoena was issued requiring me to provide financial records, details concerning entry into the retainer agreement, who entered into the retainer agreement on behalf of the client if not the client himself, how the fees were paid, who paid them, and related questions.

Upon receiving the subpoena, I, representing Mr. Sheehan, and my co-counsel--Albert Krieger, a Past President of NACDL--representing Mr. Groh, retained independent counsel to represent our own interests in connection with the subpoena and the motion to quash it.

The waste of time and energy in pursuing this side issue has been enormous. Although we ultimately prevailed on the forfeiture issue, Mr. Krieger and I spent approximately 80 percent of our time on this case defending not our clients, but the continuation of our attorney-client relationship with them. The case was derailed from its normal course for approximately seven months, just on the litigation of the original subpoenas--without regard to further efforts expended on the forfeiture issue itself. It has represented a major obstacle to the speedy administration of justice in this case. And the diversion of my energy onto these side issues guaranteed that my client would not receive the quality of representation to which he was entitled.

As noted earlier in the discussion of the Genego study, the growth of such subpoenas is quite a recent phenomenon. At one time, the practice was forbidden. As one former Justice Department prosecutor has stated:

> There was a policy [at the Justice Department] not to subpoena attorneys for either oral testimony or documents that were generated subsequent to and as a result of the attorney-client relationship. . . . It was considered barbaric at the Department of Justice in the 10 years that I was there [from 1963 to 1973] to try to turn a lawyer into an informant and, worse, a witness against a client in the very matter in which the lawyer was retained as counsel.

Tornay v. U.S., Case no. C85-272 R (D. Wash) (statement of John Wall, Esq., testifying as an expert at an evidentiary hearing, November 26, 1985).

The highest court of one state has responded to the current crisis by imposing a requirement of prior judicial review for all attorney subpoenas. The Massachusetts Supreme Judicial Court has promulgated a disciplinary rule declaring it "unprofessional conduct" for any prosecutor, whether in Federal or state court, to issue such a subpoena without prior judicial approval. This rule was recently upheld against a challenge on Supremacy Clause grounds by the Massachusetts U.S. Attorney. U.S. v. Klubock, Civ. no. 85-4809-Z (D. Ma., February 28, 1986).

A similar position--though more expansively set forth with regard to the circumstances under which prior judicial approval may be granted--was taken by the full House of Delegates of the American Bar Association on February 10, 1986.

Recommendations for action

On attorney subpoenas: NACDL strongly recommends the enactment of federal legislation requiring prior judicial approval of subpoenas to defense counsel, under carefully circumscribed criteria.

The Justice Department takes the position that the problem is adequately addressed by its internal guidelines, and by the current availability of judicial review after the judgment has issued, by way of a motion to quash under rule 17(c) of the Federal rules of Criminal Procedure. These are not adequate solutions.

First, the guidelines are, by the Justice Department's own proud declaration, entirely unenforceable. We note the Department's guidelines in the law Enforcement area, which concern the rights, either substantive or procedural, and protect no remedy. They do, however, affirmatively approve the practice of subpoenaing defense counsel to provide information against a client. And attorney defense counsel must therefore advise clients of the risk that information given by the client to the attorney for the purpose of defending the criminal charges may have to be surrendered by the attorney to the prosecution, and of the risk that this act may disqualify the attorney from further representation of the client. The mere potentiality of such a subpoena, issued by the prosecutor alone without judicial participation, is obvious enough to chill the free flow of information within the attorney-client relationship.

Second, a post-issuance motion to quash is no substitute for prior judicial review. The quashing is not simply the giving. There is a significant potential that must accompany the rule 17(c) procedure.

In reviewing a motion to quash, federal courts, as a matter of practice, generally afford a presumption of validity to subpoenas, and hold reluctantly to support claims. The problem is compounded in order to take an appeal from a District court's ruling in support of a subpoena, the attorney must first submit to a contempt finding, and appeal as a contemnor. If the contempt finding is sustained, the attorney is forever precluded by it. Quite aside from the risk of imprisonment for up to 18 months, and the potential harm to the attorney's practice and professional reputation, a finding of contempt against an attorney will generally preclude entry into the bar of another state, and will effectively appearance "pro hac vice" (i.e., one time) in another jurisdiction.

This process also entails considerable expense and an added litigation burden on the parties and the court, since a contempt proceeding becomes a new, separate proceeding from the underlying case. Typically, the attorney must hire another attorney to handle the contempt case. The additional factor sometimes arises simultaneously with the contempt proceed in for the client to litigate personally on the attorney's behalf. This approach also requires hiring an additional attorney, and is further limited by the fact that clients often prefer not to get involved, and risk provoking the prosecution, in a proceeding that, like more at the lawyer's discretion that at their own.

In the Northern [illegible] has aggressive activities. The [illegible] which allows the prosecutor unnecessary risks is, the limited case of Enforcement of attorneys' fees in forfeiture to address the serious civil-case-based exercise and the many issues of potential problems which may arise in pursuing forfeitures of assets transferred to other hands of bona fide third party interviews. Either way, the standard should nevertheless should the "fraud or crime" exception suggested in the majority decision report and endorsed in the [illegible] case and the progeny.

In support of the broader approach, we would call the Committee's attention to the possible chilling effect on pro bono work by the Justice Department's aggressiveness of the bar in a range of third-party transfers etc., perhaps by virtue of raising doubt that having read about the Defendant's conference in the court

newspaper, cannot assert that they were "reasonably without cause to believe" that the assets were derived from criminal activities and thus subject to forfeiture. This category of transferees is potentially enormous--from the accountant and the banker to the grocer, the doctor and the local utilities. Unless the "fraud or sham" exception is applied across-the-board to the relation-back doctrine, every such transfer will remain under a cloud, for the life of the legislation.

I ask this Committee: What's the point? Change the statute and let all legitimate business be transacted as usual.

Conclusion

Mr. Chairman and distinguished members of the Committee, NACDL would welcome an opportunity to assist the Committee in developing the necessary legislative language to address these very serious issues raised by the 1984 crime legislation. We appreciate your sensitivity to these issues, as reflected in the convening of these hearings, and encourage you to move swiftly to remedy the situation.

We are including with this testimony (as Attachment no. 5), Mr. Chairman, for the Committee's information, a paper presenting NACDL's analysis and recommendations for other related, minor amendments to the 1984 forfeiture provisions.

This concludes my prepared statement. I would be pleased to respond to any questions any member of the Committee may have.

Attachment no. 1

Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense

by William J. Genego

Introduction

The right to counsel is paramount among the rights guaranteed to an accused, because the enforcement of all other rights of the defendant is dependent upon having an attorney to assert those rights. The criminal defense attorney actually fulfills a dual function. First, the attorney ensures that the accused is able to defend adequately against the state's allegations. Second, the attorney fulfills an institutional function by ensuring that the adversary process is evenly balanced and that fair results are achieved. If the right to counsel is compromised, not only are the rights of individual citizens affected in specific cases, but the operation of the system of criminal justice as a whole is jeopardized.

A heated debate has emerged in the legal community over claims that federal prosecutors regularly engage in practices that compromise the right to counsel. Criminal defense attorneys charge that federal prosecutors are employing a variety of investigative practices – not to fulfill a legitimate need to obtain evidence – but to discourage zealous representation by defense attorneys and to prevent particular attorneys from representing specific clients. For example, defense attorneys claim that prosecutors direct grand jury subpoenas and IRS summonses to attorneys concerning information about past or present clients, even though the information is available from other sources. This means the attorney is put in the position of providing information to be used against the client and creates a conflict that prevents the attorney's further representation of the client. The defense bar maintains that these practices are a part of a general prosecutorial program to target vigorous and successful attorneys for government harassment. Defense attorneys charge that prosecutors are using a range of techniques – including grand jury subpoenas, the IRS summons processes, actions seeking forfeiture of legal fees, disqualification motions, confidential informants at defense meetings, and attempts to entrap attorneys through "clients" or supposed neutral witnesses who are in fact working with the government – all in an effort to discourage attorneys from representing criminal defendants.[1]

The enforcement of all other rights is dependent upon having an attorney to assert those rights.

In response, government attorneys argue that the challenged practices are used only for legitimate investigatory and prosecutorial reasons. Prosecutors maintain that they employ valid legal procedures made available to them by Congress and courts and deny that they are targeting criminal defense lawyers or attempting to interfere with defendants' rights to counsel. Further, the prosecutors insist that such practices are not widespread and are selectively utilized in appropriate circumstances.[2]

This controversy has resulted in activities in both the courts and Congress. When federal prosecutors attempt to obtain information from defense attorneys by subpoenas and summonses or to forfeit their legal fees, defense attorneys have responded by claiming that these efforts violate the defendant's Sixth Amendment right to counsel.[3] Defense attorneys have also made requests to both Congress and courts to take remedial action to prohibit or police these prosecutorial practices. For example, the possibility of federal legislation has been discussed at some length. Further, one court (the Massachusetts Supreme Judicial Court) has declared that it is unprofessional conduct for the government

William J. Genego, LL.M., Georgetown University Law Center, 1977; J.D., Yale Law School, 1975; B.S., New York University, 1972.

Bill Genego teaches law at the University of Southern California Law Center.

Copyright 1986, by William J. Genego. All Rights Reserved.

1. *See, e.g.*, Tarlow, *Federal Prosecutors Step Up Attack On Defense Lawyers*, CACJ Forum, July-August, 1985; *Targeting Lawyers*, Nat'l L.J., January 21, 1985, at 1.

2. *See, e.g.*, *The Defense Bar: On The Defensive*, Nat'l L.J., December 1985, at 3; *Has U.S. Put Lawyers On The Defensive*, The Los Angeles Times, June 14, 1985, p. 1, col. 1.

3. *See, e.g.*, *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir. 1985) (en banc); *United States v. (Under Seal)*, 774 F.2d 624 (4th Cir. 1985); *In re Klein*, 776 F.2d 628 (7th Cir. 1985); *United States v. Baldalamenti*, 614 F.Supp. 194 (S.D.N.Y. 1985); *United States v. Parden*, 605 F.Supp. 539 (S.D.N.Y. 1985), *rev'd on other ground* 767 F.2d 26 (2d Cir. 1985); *United States v. Rogers*, 602 F.Supp. 1332 (D.Colo. 1985).

4. *See* Massachusetts Supreme Judicial Court, Rule 3:08, Prosecution Function 15 (1986). This rule has survived a challenge brought by prosecutors requesting that enforcement of the rule be enjoined. *United States v. Klubock*, No. 85-4809 (D.Mass. _____, 1986), *discussed in detail in* Tarlow, *RICO Report – Update on Attorney Subpoenas*, THE CHAMPION, 6 May 1986, at 36.

to subpoena an attorney to provide information concerning a client without prior judicial approval.[4] The United States Congress is planning to conduct hearings on these issues to determine whether legislative action is appropriate.

Given the importance of the right to counsel to the adversary system, it is essential that this debate be well informed. Critical to the debate is the need for information concerning prosecutorial practices which directly affect the criminal defense attorney. To obtain such information I surveyed, in May and June, 1985, by written questionnaire, all of the members of the National Association of Criminal Defense Lawyers (NACDL).[5] The survey was designed to obtain information about prosecutorial practices which may affect criminal defense attorneys and the attorney-client relationship. The questionnaire was intended to document the experiences of individual criminal defense attorneys, to elicit their perceptions of specific prosecutorial practices, and to inquire of the effect, if any, such experiences and/or perceptions were having upon criminal defense attorneys.

Defense attorneys charge that federal prosecutors are employing investigative practices to discourage zealous representation.

The Survey

A total of 4,024 questionnaires (representing the total number of members of the NACDL as of May, 1985) were mailed in late May and early June, 1985. Seventy-four were returned without delivery. Of the 3,950 questionnaires delivered, 1,648 were returned, a response rate of 42%.[6] The questionnaire was 15 pages in length and asked four sets of questions.

The first set of questions asked for information about the responding attorneys:

(1) the percent of their practice devoted to criminal cases;

(2) the percent of their criminal cases being federal (versus state) prosecutions;

(3) the percent of their criminal practice devoted to various types of offenses (white collar, drug, offenses against individuals and property, other offenses);

(4) the percent of the criminal cases handled by the attorney in which he or she had been privately retained (versus court-appointed);

(5) the number of years they had been in practice;

(6) the number of years they had been practicing criminal defense;

(7) their age; and

(8) their approximate annual income.

A second set of questions asked for the respondents' view of the government's investigation and prosecution of criminal defense attorneys. Specifically, the respondents were asked whether they believed that either the Department of Justice or individual United States Attorneys' offices had intentionally adopted a practice of investigating or prosecuting attorneys who represent defendants in criminal cases as a means of inhibiting and discouraging zealous representation of criminal defendants and, if so, when they believed such a practice had been adopted.[7]

The third set of questions asked for information about a variety of specified prosecutorial practices. For each of the practices identified, the questionnaire asked whether the respondent had either been the subject of the particular action (and if so, when it had occurred and in what jurisdiction) and/or whether the respondent personally knew an attorney who had been subjected to the practice identified (and if so, when it occurred and in what jurisdiction). Among the specific practices inquired about were:

(1) the receipt of grand jury subpoenas;

Prosecutors maintain that they employ valid legal procedures made available to them by Congress.

(2) the receipt of summonses from the Internal Revenue Service;

(3) the government's use of confidential informants at defense meetings;

(4) attempts to forfeit money paid attorneys or to prevent a defendant from using his or her assets to pay attorneys fees; and

(5) efforts to disqualify an attorney from representing a particular defendant.

The fourth and final set of questions sought information about the effect of these practices and specifically asked:

(1) whether the respondent had ever decided not to accept a criminal case based upon a concern that it might result in a government examination or investigation of the respondent or a challenge to the fee to be paid (and if so, when this had occurred);

(2) whether the respondent had ever decided not to take a particular action in his or her representation of a client based upon a concern that it might result in a government examination or investigation of his

5 The NACDL is the single largest membership organization of criminal defense lawyers in the United States. Its objectives are to "promote the proper administration of criminal justice" and to "concern itself with the protection of individual rights and the improvement of criminal law, in practice and procedures." NACDL By-Laws, Article II.

The members of the NACDL may represent a population more likely to have been affected by the practices examined than lawyers in general. This sample population was chosen because the object of the survey was to obtain data about the incidence and possible effects of specified prosecutorial practices on criminal defense representation. The membership of the NACDL presented an efficient means of obtaining such information.

6 The likelihood that an attorney would respond to the questionnaire was probably greater if they had been the subject of one or more of the practices examined. While this might introduce a bias in the results of the survey, even if it is assumed that everyone who did not return the survey had not been affected by or subject to any of the practices, given the high rate of incidences and effects of the practices, the reported results, discussed infra, are still significant.

7 These questions about the respondents' beliefs were asked second to reduce the potential bias in the answers that might have been occurred from the effects of ordering if the questions were asked after the questions concerning the respondents' individual experiences.

8 Unless otherwise indicated, all percentages herein are based on the number of attorneys responding to the question.

or her practice (and if so, when this had occurred), and

(3) whether the government's use of the practices identified had resulted in the attorney making changes generally in the methods or procedures of his or her practice.

The Sample Population

The characteristics of the sample population can be obtained by examining the respondents' answers to the first series of questions and calculating percentages based on the number of attorneys responding to each question.[8] The results recorded in **Figure 1** reveal that a significant number (39%) of the 1,634 attorneys responding to this question devote virtually all of their legal practice to the defense of criminal cases. Moreover, 77% devote at least half of their legal practice to criminal defense.

The next series of questions asked the respondents to indicate what percentage of their criminal practice was devoted to defending federal and state criminal prosecutions. Seventy-five percent of the respondents devote fifty percent or more of their criminal practice to defending state prosecutions, twenty-five percent of the respondents devote fifty percent or more of their criminal practice to federal prosecutions (see **Figure 2**). While the practice of the respondents is weighted toward state prosecutions, seventy-eight percent of the respondents handled at least some federal criminal prosecutions.

The questionnaire also sought data about the types of cases which were defended by the respondents. The respondents were asked to indicate what percentage of their criminal defense practice was devoted to the following types of cases: white collar offenses; drug offenses; offenses against individuals and property; and other types of offenses. The results are recorded in **Figure 3**.

The respondents were asked what form of practice affiliation they had – whether sole practitioner, member of a defender organization, or firm with other attorneys and, if so, the size of the firm. The results, recorded in **Figure 4**, show that 89% of the respondents were private criminal practitioners and that a large number of the respondents (74%) practiced either alone or in small firms (2-5 attorneys).

Asked to indicate what percentage of the cases they handled for the years 1983 and 1984 were cases in which they were privately retained, about a third of the respondents said they handled only private criminal cases, while 64% had a mixture of private cases and cases in which they were acting as appointed counsel. (See **Figure 5**).

The questionnaire also asked the respondents' age group. At the time of the questionnaire, the respondents were predominantly less than 46 years of age, as only 17% of the respondents were more than 45 years old. (See **Figure 6**.) **Figure 7** reports the results when the respondents were asked to indicate the number of years they had been practicing criminal defense: about half of the respondents (48%) had been practicing criminal defense for 10 or more years and all but a few (4%) had been practicing criminal defense for at least three years.

Finally, the questionnaire also asked the respondents their approximate annual income from the practice of law; these results are recorded in **Figure 8**.

Figure 1
Extent of Practice Devoted to Criminal Defense

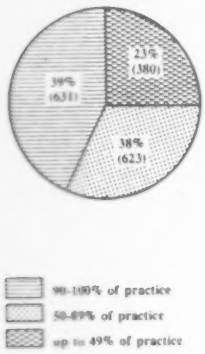


Figure 2
Extent of Practice Devoted to Federal Prosecutions | **Extent of Practice Devoted to State Prosecutions**

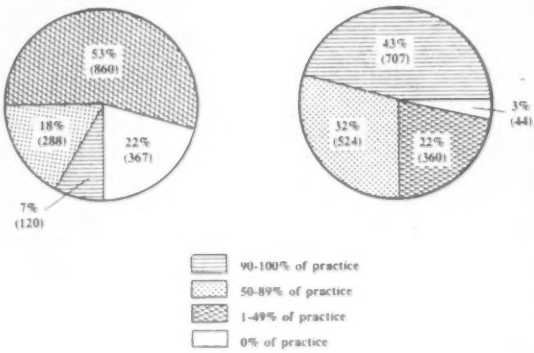


Figure 3
Types of Cases Defended

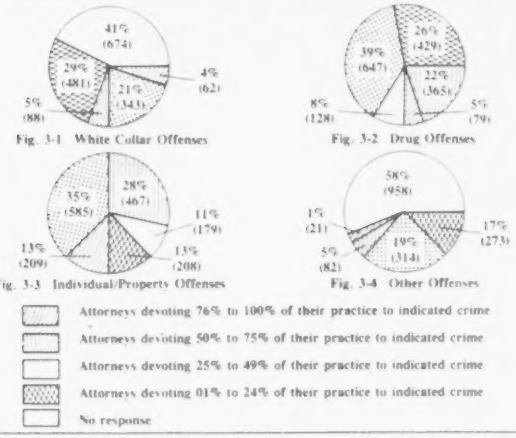


Figure 4
Practice Affiliation

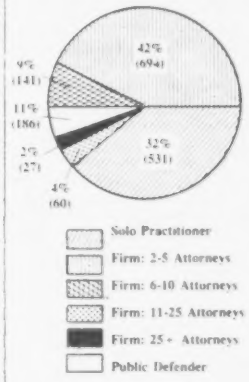


Figure 5
Cases in Which Privately Retained

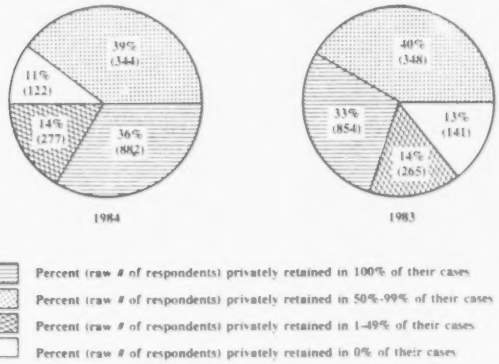
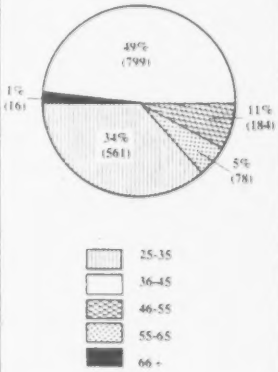


Figure 6
Age of Respondents



Major Findings

In general, the prosecutorial practices examined by the questionnaire were reported to be widespread. Further, the responses indicate a dramatic rise in the government's use of these practices in the last 30 months. Moreover, specific characteristics of an attorney's practice increased the likelihood that he or she reported having been subjected to the identified practices. Finally, the responses indicate that the government practices surveyed have had a substantial impact upon the professional behavior of criminal defense attorneys: 731 of the attorneys (46% of those responding to this question) indicated they had made at least some changes in their practice.

The Incidence Of The Prosecutorial Practices Examined

The questionnaire asked the attorneys if they had been subjected to certain identified practices (the questions asked concerning each of the practices are reproduced at right); overall, 1,103 reported having been subject to one or more of these practices, representing 67% of the total number of questionnaires returned. For those who indicated that they had been the subject of a particular practice, the questionnaire asked the respondent to identify from four time periods *when* the event had occurred: 1983-mid-85; 1980-82; 1975-79; or 1974 and earlier.[9] Time proved to be a relevant factor, as Figure 9 indicates. These figures indicate a dramatic rise in the government's use of these practices during the thirty-month period (1983 to mid-1985) prior to the survey. The responses also suggest that, prior to 1980, these practices were relatively infrequent.

The reported extent of the prosecution practices also varied according to the characteristics of the attorney. While all types

9. A bias exists in reporting events over time because more recently experienced events are remembered more vividly and are thus more likely to be remembered. However, the non-uniform distribution of the different practices over time as reported here suggest that this bias was minimal in the survey results.

13(a). Have you even been subpoenaed to appeal before a grand jury to provide testimony or to produce documents related to your fee and/or billing records on your representation of a client?

A. yes _____
B. no _____
C. yes and more than once _____ (indicate number)

15(a). Have you even been served with a summons from the Internal Revenue Service which concerned your legal practice?

A. yes _____
B. no _____
C. yes and more than once _____ (indicate number)

17(a). Have you ever been involved in a multi-defendant case in which a defendant was cooperating with the prosecution and the government deliberately kept secret the defendant's cooperating status from the other defense attorneys prior to trial?

A. yes _____
B. no _____
C. yes and more than once _____ (indicate number)

23(a). Have you ever been involved in a criminal case in which the government challenged or questioned the legitimacy of the money you received or were to be paid or attempted to prevent the defendant from using his or her assets to pay your fee?

A. yes _____
B. no _____
C. yes and more than once _____ (indicate number)

(b). If your answer to question 23 was yes, indicate when this occurred.

A. 1983-85 _____
B. 1980-82 _____
C. 1975-79 _____
D. 1974 and before _____

(c). If your answer to question 23 was yes, indicate the jurisdiction(s) in which this occurred.

25(a). Has the government ever moved to disqualify you from representing a client?

A. yes _____
B. no _____
C. yes and more than once _____ (indicate number)

(b). If your answer to question 25 was yes, indicate when this occurred.

A. 1983-85 _____
B. 1980-82 _____
C. 1975-79 _____
D. 1974 and before _____

(c). If your answer to question 25 was yes, indicate the jurisdiction(s) in which this occurred.

(d). If your answer to question 25 was yes, indicate the basis for the government's claim that you be disqualified from representing the client (conflict of interest—previous representation of a witness; etc.).

Figure 7
Years in Criminal Defense

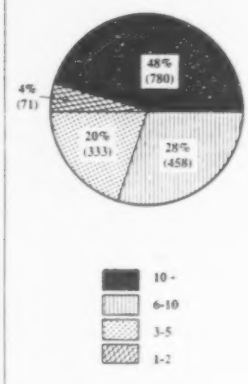
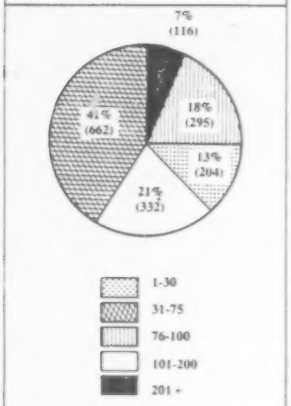


Figure 8
Annual Income
(In Thousands of Dollars)



of attorneys reported that they had been the subject of all of the practices identified, several factors could be identified which increased the likelihood of such an occurrence. The attorneys who reported the most frequent instances of being subjected to the prosecutorial practices were those engaged in private practice handling white collar or drug cases, those who had been practicing criminal defense the longest, and those earning the most money. For example, 18% of the questionnaires reported the receipt of a grand jury subpoena, but 32% of those attorneys responding to this question whose practice consisted 50% or more of white collar crime cases had received a grand jury subpoena and 24% of those responding to this question whose practice consisted 50% or more of drug cases reported having received grand jury subpoenas; only 9% of those responding to this question whose practice consisted 50% or more of cases involving crimes against property or individuals reported receiving a grand jury subpoena. An analysis of the reported incidence of the practices according to the type of cases handled, years of practicing criminal defense work and income, is recorded in **Figures 10-12.**

The Effects of the Prosecutorial Practices

To determine what effect, if any, the government's practices have had upon criminal defense attorneys, three questions were asked:

(1) whether the respondent had ever decided not to accept a criminal case based on a concern that it might result in the government examining or investigating the attorney's practice or a challenge to the fee the attorney was to be paid (and, if so, when this had occurred);

(2) whether the respondent's decisions in evaluating particular actions to be taken in the defense of a client had ever been affected by a concern that the action could result in the government examining or investigating the attorney's practice (and, if so, when this had occurred); and

(3) whether the respondent had made any changes in the methods or procedures he or she followed in practicing criminal defense based on the concern that the government might investigate the attorney or his/her practice.

According to the responses received, the reported government use of the identified prosecutorial practices has had a marked impact upon the respondents' practice of criminal defense.

Forty-six percent of the attorneys responding to this question indicated that they had made some change in their practice of criminal defense based on the government's activities. Of the 731 attorneys who reported having made changes in their practice, 60% had been the subject of one or more of the practices identified. The attorneys who most frequently reported that they had made changes in their practice were attorneys who predominantly handled white collar or drug offenses (see **Figure 13**) and those who had the highest incomes (see **Figure 14**.

Thirty percent of the questionnaires reported an effect on the evaluation of whether to take a particular action on behalf of a client. Virtually all of the 497 attorneys who reported that their evaluation of actions had been affected reported that they had done so only within the last four years. See **Figure 15.**

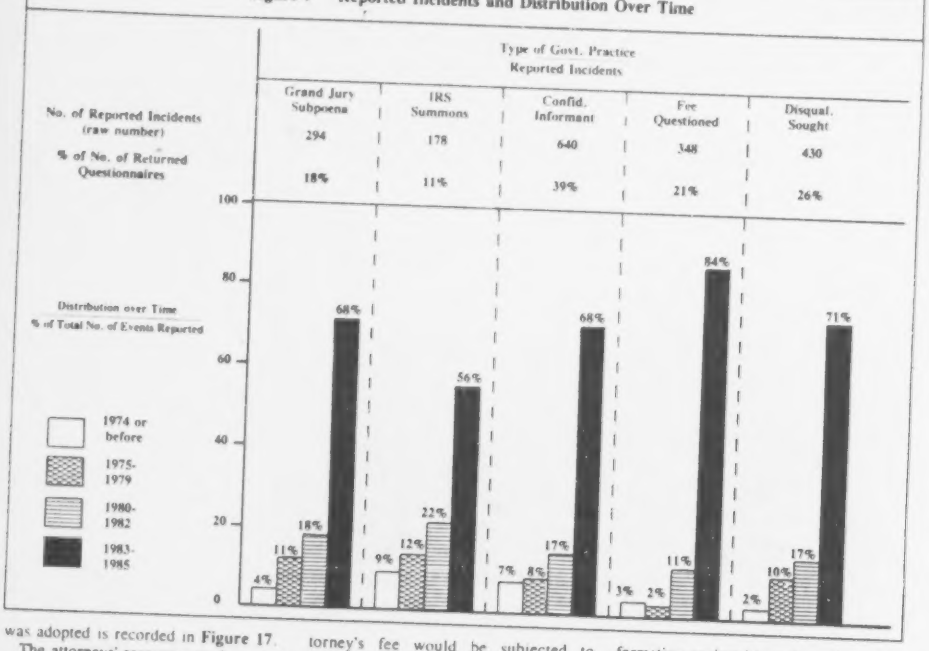
Fourteen percent of the attorneys responded that they had decided not to accept a specific criminal case or cases. Of those attorneys who had decided not to accept a case, virtually all had done so within the last thirty months. No attorney reported not taking a case based on a concern of government actions prior to 1974. The distribution over time of such decisions is recorded in **Figure 16.**

Reported Beliefs And Experiences

The responses to the survey also provide information about the respondents' views of the government's activities and the individual experiences of the respondents: the questionnaire asked: "Do you believe the Department of Justice has intentionally adopted a practice of investigating and prosecuting attorneys who represent defendants in criminal cases as a means of inhibiting and discouraging zealous representation of criminal defendants?"

Eighty percent of the respondents answering this question (1,481 of 1,648 questionnaires returned) reported they had such a belief. Of the 1,182 attorneys who reported such a belief, 86% had been the subject of one or more of the practices identified by the questionnaire. The respondents' view as to when this practice

Figure 9 Reported Incidents and Distribution Over Time



was adopted is recorded in **Figure 17**.

The attorneys' responses to the survey were, in some instances, supplemented by written comments providing individual experiences of the respondents. Thirty-one percent reported that their evaluation of what they believed to be legitimate defense actions had been affected by a concern that taking the action might result in a retaliatory government investigation. Specific actions were cited in written comments, and included not interviewing witnesses who were to testify for the prosecution and not defending clients' interests in government efforts to forfeit assets. In addition, attorneys reported that they had been placed in a conflict of interest position with their clients as a result of various prosecutorial activities. For example, at least three attorneys reported that they had been presented with plea bargain offers for their clients which implicated their own fees – if a client plead guilty, the prosecution would not seek forfeiture of the attorney's fee, but if the client insisted on going to trial, the attorney's fee would be subjected to forfeiture action if a conviction was obtained.

As reported above, a substantial number of attorneys (731) reported that they had made changes in their practice of criminal defense as a result of the prosecution's increased use of the practices identified by the survey. Attorneys repeatedly stated that they were less open and more guarded in providing advice to clients out of a fear that their advice might be misinterpreted and used against them by the client, later cooperating with the government. At least eleven attorneys reported specific instances of having been approached by purported witnesses or potential clients (who were in fact working for the government) who, in disguised capacity, attempted to engage the attorney in misconduct. Thirty-three attorneys reported that they do not keep any records or keep fewer records because of a concern that the government will subpoena the records, which would then put the attorney in the position of providing information against his or her client. One hundred eighteen attorneys reported that they kept far more detailed records and twenty-four attorneys reported requiring clients to sign agreements or contracts stating that the money used to pay the attorney's fee was not in any way associated with or tainted by criminal activity.

The second type of effect reported is deterrence: defense attorneys stated that they have refused to handle criminal cases. Fourteen percent of the attorneys stated that they had decided not to take a case based on a concern that the case might result in an investigation that would affect their legal practice or that the government might attempt to forfeit their fee. In addition, twenty-nine attorneys stated that they had made a decision to take fewer criminal cases while sixteen other attorneys reported that they had decided to end their federal criminal practices completely. These attorneys indicated that the possible risk of a government investigation – such as being subpoenaed by a grand jury – and the re-

Figure 10

Incidence of Prosecutorial Practices Reported According to Attorney's Caseload

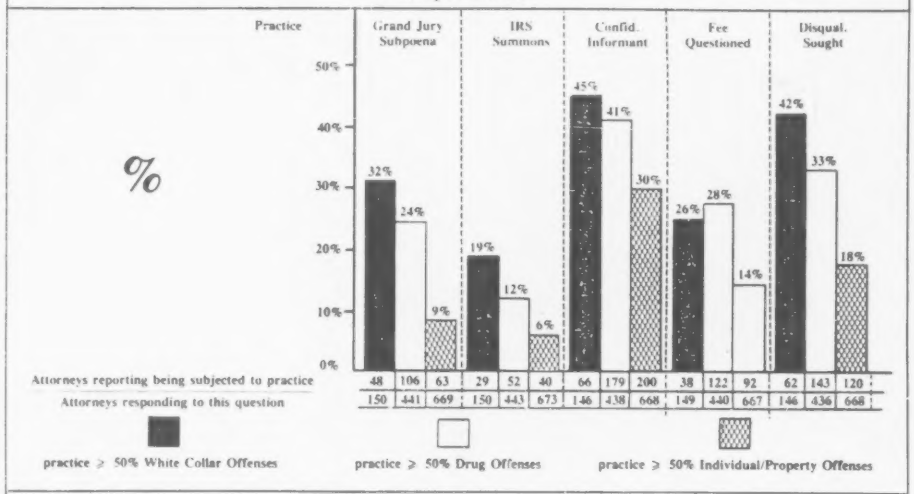
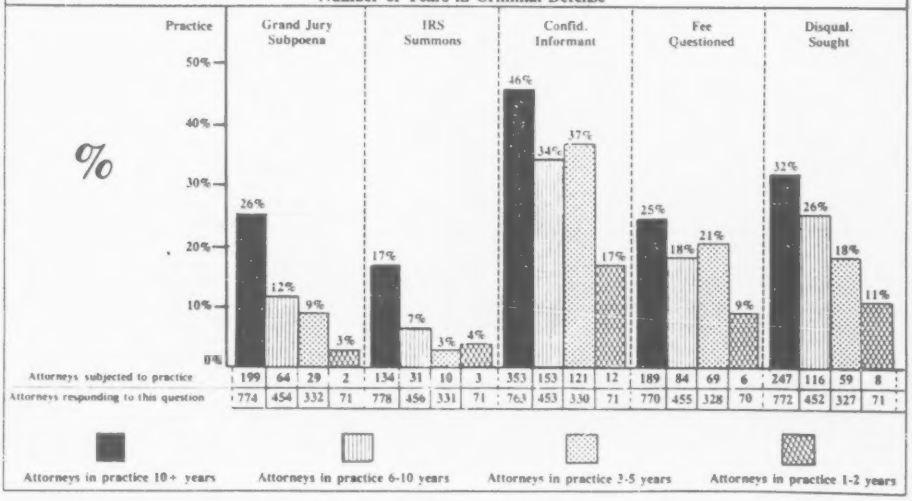


Figure 11

Incidence of Prosecutorial Practices Reported According to Number of Years in Criminal Defense



sulting time required to respond to such an investigation and its possible effect on their reputations in the community made criminal practice undesirable and too costly.

Summary

The data from this survey support several general conclusions. First, a significant number of criminal defense attorneys report having been subjected to the prosecutorial practices examined by the survey. Second, the respondents report a dramatic increase in the prosecution's use of such practices since 1980. Defense attorneys report a consistent increase in the practices over time, and, for the most recent time period, 1983 to mid-1985, the use of these practices has jumped enormously. Third, the likelihood of being subjected to the practices varies significantly with the type of cases handled, the number of years practicing criminal defense, and the amount of money earned. These variables suggest that the attorneys who are the most experienced and the most successful (as measured by income) are the most likely to be subject to these practices.

The Import of the Findings

Do these data indicate that the government has adopted a policy of investigating and harassing criminal defense attorneys as a means of discouraging zealous advocacy? When asked this question, 80% of the 1,481 attorneys responding to this question reported that they believed this to be true. See Figure 17, *supra*. While the data might be seen as supporting such a conclusion, the survey cannot, of course, establish that such a policy has been intentionally adopted by the Department of Justice. This survey was addressed to defense attorneys, not to prosecutors. Further, the reported increase in such prosecutorial practices could be explained by a variety of other factors. Congressional, court and prosecutorial decisions may all have had an effect. For example, statutory changes in the criminal code have occurred in the last several years. In 1984, at the request of the Department of Justice, Congress adopted for the first time a "relation back" provision to the criminal forfeiture of assets in the Comprehensive Crime Control Act of 1984 (18 U.S.C. § 1963[c]; 21 U.S.C. § 853[c]). Under the relation back concept, the government's interest in money or other property that is derived from criminal activity (and is thus subject to forfeiture) vests at the time of the commission of the criminal act and is not affected by a subsequent transfer. This provision has thus made it much easier for prosecutors to seek the forfeiture of attorneys fees. Similarly, Supreme Court interpretations have had an impact. For example, the Court has held that the disqualification of an attorney in a criminal case is not appealable pretrial. *See Flanagan v. United States*, ___ U.S. ___, 104 S.Ct. 1051 (1984). This decision makes it far more attractive for a prosecutor to seek disquali-

Figure 12

Incidence of Practices According to Income

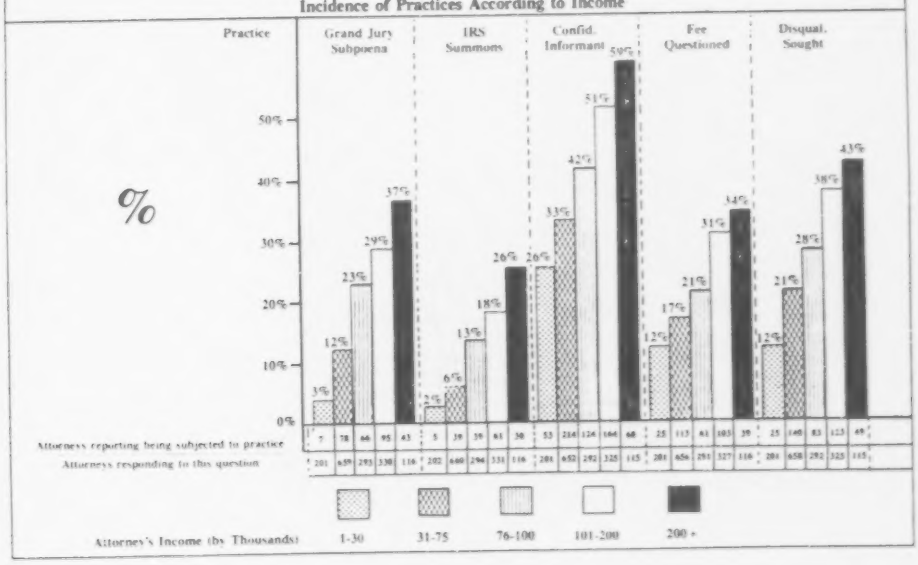
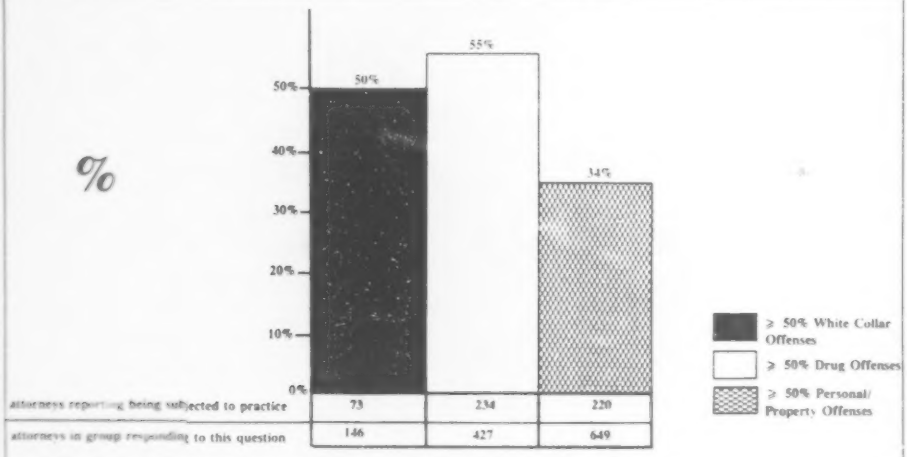


Figure 13

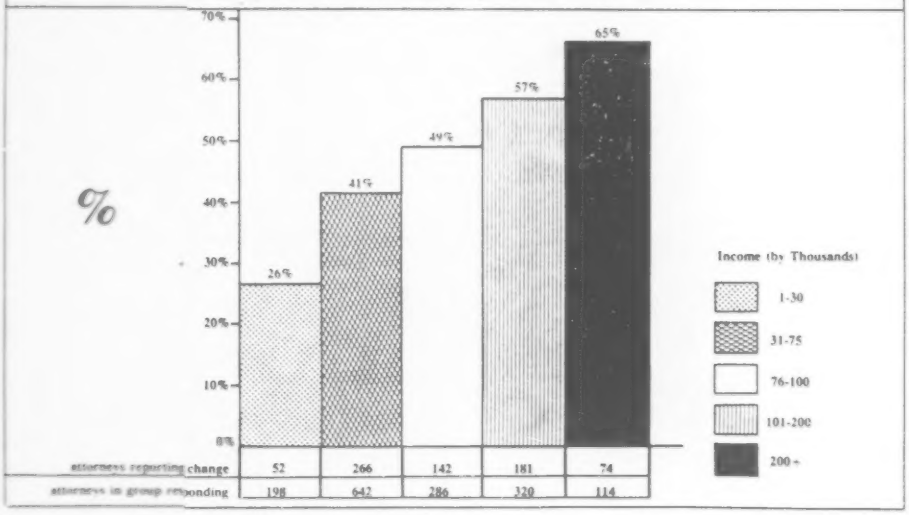
Attorneys Reporting Changes in Practice According to Caseload



attorneys reporting being subjected to practice	73	234	220
attorneys in group responding to this question	146	427	649

Figure 14

Attorneys Reporting Changes in Practice According to Income



attorneys reporting change	52	266	142	181	74
attorneys in group responding	198	642	286	320	114

Figure 15

Effect of Prosecution Practice – When Effect Occurred

Distribution Over Time

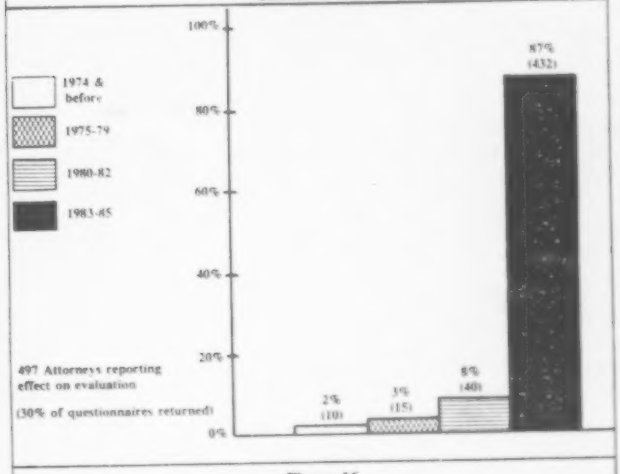
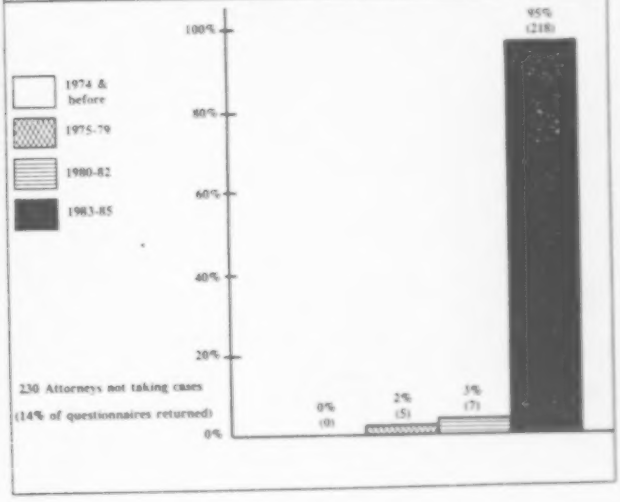


Figure 16

When Decision Not to Take a Case Occurred

Distribution Over Time



fication of defense counsel: it removes the possibility that the prosecution will be delayed by a pretrial appeal of the disqualification issue, and it means the disqualification issue will be subject to a harmless error standard of review on appeal. Similarly, judicial rulings narrowly interpreting the attorney-client privilege (and thus upholding the right of the government to obtain information from attorneys through grand jury subpoenas and IRS summonses) have made it more likely that prosecutors will be able to utilize successfully such procedures. *See, e.g., In re Ousterhoudt*, 722 F.2d 591 (9th Cir. 1983).

The recent use of the practices might also be seen as a consequence of the government's decision to concentrate its prosecutorial resources on certain kinds of offenses. The complex nature of many white collar and drug offenses that commonly involve the control and transfer of assets and other recorded events (in particular, offenses charged under the Racketeer Influenced and Corrupt Organization statute [18 U.S.C. § 1962] and Continuing Criminal Enterprise offenses [21 U.S.C. § 848]) make it likely that relevant evidence will be in the hands of attorneys.

The reported increase in the use by prosecutors of these practices may also be a function of changing views of prosecutors. As government prosecutors face numbers of well-to-do defendants who are represented by aggressive and skilled attorneys, prosecutors may well be responding by employing tactics to disarm the adversary. An obvious target is the defendant's most powerful weapon – the attorney in charge of the defense. By preventing defense counsel from handling particular cases or by causing the attorney's efforts to be devoted to challenging the legality of subpoenas and the like, the prosecution is often able to undermine the defense effort. Prosecutors and other government agents may have come to perceive these tactics as acceptable and even efficient means to obtain information about a defendant and to increase the prosecution's likelihood of obtaining a conviction.

The question of whether the government has adopted a policy of using the identified practices intending to discourage zealous advocacy by criminal defense attorneys is, however, beside the point. What is important is that the practices are in fact used, their use is widespread, and they have al-

ready had an effect on the professional behavior of criminal defense attorneys.

The Appropriate Response

This survey documents that, even if unintentionally, the government is chilling the interchange and relationship between client and lawyer, causing attorneys to be less aggressive out of fear of antagonizing prosecutors and jeopardizing their (the attorney's) own welfare, and, in some instances, making the defendant's choice of counsel unavailable. That these effects are widespread and have impacted profoundly on the practice of criminal defense has important implications for the proper functioning of the adversary process: these effects impede one side's ability to prepare and present its case on the merits.

Rather than being able to singly devote himself or herself to the defense of the client, the attorney must be concerned with personal welfare, possible selective evaluation by the prosecution, and the expenditure of defense resources on collateral issues relating to the attorney's ability to continue to represent the client. This impedes the proper functioning of the adversary process. While the government should not be deprived of its ability to lawfully gather all relevant and unprivileged evidence of criminal activity and should not be hampered in its legitimate enforcement of the law, these interests should not be fulfilled at the expense of appropriate defense advocacy. The question that must be addressed is: "How can the sense of fear and intimidation experienced by the criminal defense bar be diminished without depriving the prosecution of its ability to gather evidence of criminal activity?"

The effects that the prosecutorial practices are having on defense representation result from the concern of defense attorneys that prosecutors are using these practices in bad faith. Defense attorneys see the government's use of these practices as an unfair means of interfering with their ability to represent their clients.

The essential aspect of the prosecutorial practices which gives rise to these concerns and the resulting effect on defense representation is their discretionary nature. For example, the decision to issue a grand jury subpoena to 365 substitute to an attorney or to attempt to forfeit an attorney's fee is a discretionary decision made solely by the prosecution. Such discretionary power of the prosecution (which is practically unreviewable) that creates the imbalance in the adversary process has resulted in a chilling effect on defense representation.

This imbalance must be addressed by policing the prosecution's use of practices which impact directly upon the criminal defense attorney. Voluntary internal guidelines adopted by the government to govern the use of such practices do not fulfill this function; they are not enforceable, and do not, therefore, provide the defense with actual protection. Thus, both the courts and Congress must be responsive to the need to ensure that defense attorneys are not subjected to unfair harassment and intimidation by the government. Careful policing of the prosecutor's use of such practices is contrary to the traditional deference courts provide the prosecution in such matters and to the substantial barriers courts have established to defense claims of prosecutorial bad faith. See, e.g., United States v. Goodwin, 457 U.S. 368 (1982). However, to ensure that the integrity and proper functioning of the adversary process is not distorted, courts must be willing to carefully evaluate prosecutorial practices which impact on the defense attorney and the attorney-client relationship. This requires that courts recognize the impact such practices have upon the Sixth Amendment rights of defendants. Similarly, Congress must take appropriate measures to modify current legislation or to adopt new measures which restrict the prosecutor's ability to use facilitatively neutral practices in ways that practically restrict defense advocacy and interfere with defendants' Sixth Amendment rights. Until the courts and Congress are willing to provide meaningful safeguards governing such practices, defense representation and the adversary process will be compromised.

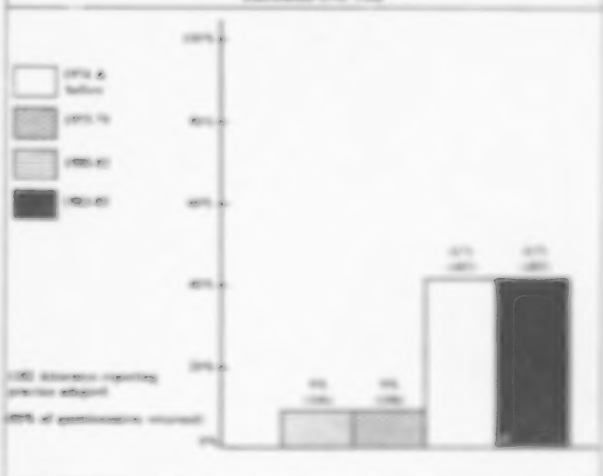
This article is based upon research funded by a grant from the University of Southern California Law Center Research Fund, and will also be discussed in a forthcoming article Fear and Loathing in the Adversary System.

I would like to thank the 1,000 members of NACDL who took the time to complete and return the questionnaire.

Figure 17

When Practice Adopted

Distribution Over Time



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

UNITED STATES OF AMERICA,

- against -

S 90 Cr. 112 (CSH)

[illegible],

Defendants.

- -

APPEARANCES:

[illegible]
United States Attorney for the
Southern District of New York
BY: [illegible]
[illegible]
[illegible]
[illegible]
One St. Andrew's Plaza
New York, New York 10007

[illegible]
[illegible]
[illegible]
New York, New York 10007

Attorneys for Defendant [illegible]

OPINION

The recently and hastily enacted Comprehensive Forfeiture Act of 1984, Pub.L.No. 98-473, Title II, has, and no doubt, will continue to result in many thorny legal issues to be considered by the courts. Two such issues are before this court. Defendants have made an application seeking the release of certain funds now subject to a restraining order which was issued pursuant to an ex parte application by the Government. Additionally, defendants seek an order declaring that attorneys' fees are exempt from forfeiture under 18 U.S.C. section 1963.

FACTS

Defendants Matthew Iannielle, Benjamin Cohen, Vincent Fiorilla, Michael Fiorilla, Anthony Fiorilla, Joseph Fiorilla and Michael Marchini, in a twenty-nine count indictment, have been charged with violating the Racketeer Influenced and Corrupt Organizations ["RICO"] statute, and with committing mail fraud and extortion. Defendants are charged in the indictment with concealing their ownership interests in Consolidated Carting Corporation, a waste carting company, in order to fraudulently obtain waste removal licenses from the New York City Department of Consumer Affairs. Defendants also are alleged to have defrauded Consolidated Edison Company of New York ["Con Edison"] by causing other waste carting companies to refrain from collecting or attempting to collect waste from the utility. In addition, defendants allegedly caused other waste carting companies to refrain from submitting bona fide bids for the collection of Con Edison's waste. Furthermore, defendants are alleged to have concealed the identity of those who had interests in Con Edison's waste removal contracts by using "front" corporations and to have caused Con Edison to overpay them for waste collection. In furtherance of this scheme, defendant Vincent Fiorilla is alleged to have extorted competing waste carting companies by threatening their owners in order to obtain their waste removal contracts from Con Edison.

On February 15, 1985, Judge Palmieri, upon the ex parte application of the United States Attorney for the Southern District of New York, issued a restraining order prohibiting the sale, assignment, pledge or disposition in any manner of certain property belonging to defendants or certain companies owned and controlled by them, to wit: Consolidated Carting Corporation ["Consolidated Carting"], Fiorilla Brothers of New Jersey, Inc. ["Fiorilla Brothers"], Tri-Compaction Sales, Inc., and Atlas Sanitation Co. Inc. The ex parte order does not provide for a hearing to contest the Government's right to restrain these assets. Although the Government and defendants reached an agreement earlier on defendants' use of certain funds which were subject to forfeiture, the parties have not been able to agree upon whether retained earnings from Consolidated Carting and

Fiorillo Brothers of New Jersey may be distributed to defendants. Defendants, therefore, have made an application to this court requesting that defendants be permitted to distribute a portion of the profits they have earned since the filing of the indictment in this case.

The United States Attorney has advised defendants and their counsel that should defendants be convicted of the RICO counts and judgments of forfeiture be obtained against them, the Government might seek to obtain attorneys' fees paid to counsel to satisfy the judgments. The Government asserts that such fees are subject to forfeiture under 18 U.S.C. section 1963.

Defendants' counsel, therefore, have entered conditional appearances in this case, agreeing to represent defendants only on condition that this court finds legal fees cannot be forfeited under 18 U.S.C. section 1963(a) and (m). Defendants have brought this motion for an order providing that legal fees paid by defendants in connection with this case are exempt from forfeiture under 18 U.S.C. section 1963(m) in order that they may be represented by their chosen counsel.

For the following reasons, defendants' motions are granted.

DISCUSSION

Forfeiture of Attorneys' Fees

18 U.S.C. section 1963(c) of the Comprehensive Forfeiture Act of 1984 provides:

> All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Section 1963(m) of 18 U.S.C. permits a third party to challenge the forfeiture of property transferred to him by a defendant convicted of RICO violations. The third party, after the judgment of forfeiture has been entered, has the burden of petitioning the court to vacate the forfeiture. An opportunity is provided to the third party petitioner to present his case at a post-conviction hearing. The third party petitioner must establish by a preponderance of the evidence that:

> (A) the petitioner has a legal right, title or interest in the property, and such right, title or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section.
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section . . . .

18 U.S.C. section 1963(m)(6).

Defendants urge this court to interpret section 1963 as precluding the forfeiture of legitimately paid legal fees or to declare the statute unconstitutional in violation of the Sixth Amendment right to the effective assistance of counsel. The legislative history of this provision, according to defendants, clearly establishes that the Congressional purpose in enacting section 1963 was to ensure that criminal defendants could not avoid forfeiture by the fraudulent transfer of their assets to confederates. Therefore, defendants argue, attorneys' fees do not fall into this category and should not be subject to forfeiture under section 1963.

The Government, however, contends that the Sixth Amendment does not prevent the Government from recovering forfeitable assets which have been transferred to an attorney. Additionally, according to the Government, Congress intended and the statute provides that forfeitable property which is transferred to an attorney may be forfeited to the same extent as forfeitable property transferred by the defendant to any other third party.

The plain language of section 1963 does not provide explicitly that attorneys' fees are forfeitable. It refers only to property or assets transferred to third parties in general. 18 U.S.C. section 1963(c). The statute also provides for a post-conviction hearing whereby third parties may challenge a judgment of forfeiture pertaining to property transferred to them, see section 1963(m), but, again, makes no reference to attorneys' fees. Because of the absence of any indication as to whether or not attorneys' fees are exempt from forfeiture, the legislative history of the Forfeiture Act must also be considered.

The scant legislative history is devoid of any explicit reference as to whether or not attorneys' fees are forfeitable. In discussing section 1963(m), however, the Senate Report states that "[t]he provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. section 1963(c) as amended by the bill." SEN. REP. P.L. 98-473, p. 209 n.47. Accordingly, it is evident that bona fide attorneys' fees paid

to defense counsel who serve the defendants' needs within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture. See also United States v. Rogers, 602 F. Supp. 1332, 1347 (D.Colo. 1985).

Even absent this guidance in the legislative history, this court still would be required to find that attorneys' fees paid for legitimately rendered attorneys' services are not forfeitable. It is a fundamental principle of statutory interpretation that in deciding among possible interpretations of a statute, the court must select an interpretation that appears to be consistent with the constitutionality of the statute. See, e.g., Gutknecht v. United States, 396 U.S. 295 (1970); United States v. Rumely, 345 U.S. 41, 45 (1953). Additionally, while the Government's goal of combatting illegal racketeering by attacking "the economic aspects of these crimes," SEN. REP. P.L. 98-473 p. 191, is laudible, it must not infringe upon the protected constitutional rights of defendants. Congress recognized this fact as demonstrated in the legislative history of a related bill, Comprehensive Drug Penalty Act of 1984, which stated "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. No. 845, part 1, 98th Cong., 2d Sess., p. 19 n. 1.[3]

In accordance with the Sixth Amendment of the Constitution, a person accused of a crime has the right to be assisted by counsel in his defense. Powell v. Alabama, 287 U.S. 45, 66 (1932). As the Supreme Court has recognized, this right "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the bases of all our civil and political institutions.'" Id. at 67, quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926). See also United States v. Mohabir, 624 F.2d 1140, 1149 (2d Cir. 1980) ("right to obtain the assistance of counsel at all crucial stages is essential if both the symbol and reality of a fair trial are to be preserved").

In addition to the right to counsel, defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice. United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1069, 1070 (2d Cir. 1982); United States v. Ostrer, 597 F.2d 337, 341 (2d Cir. 1979). Counsel of choice is not to be deprived absent a compelling need to assure the "prompt, effective and efficient administration of justice." United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1979), cert. denied 439 U.S. 485, 489 (1979). Statutory procedures or prosecutorial power also are not permitted to unreasonably abridge the right to counsel of choice. It is evident that the forfeiture of attorneys' fees would impinge upon defendants' right to counsel of choice.

This court need not determine, however, whether forfeiture of attorneys' fees unreasonably infringe upon defendants' right to counsel of their own choice, because more importantly, forfeiture would result in an abridgement of their right to counsel. As Judge Leval recently noted in United States v. Badalementi, SS. 84 Cr. 236 (PNL), slip op. at 7-8, defendants in RICO actions would find it difficult, if not impossible, to secure representation if attorneys' fees were forfeitable. A defendant's criminal defense counsel, who obviously had read the indictment and discussed the charges with his client, could not convincingly argue, if his client were convicted, that he lacked notice that the money received in payment of his legal fees may have come from the proscribed racketeering activity as required under section 1963(m). Counsel, aware that conviction of his client could result in forfeiture of his fee, would be reluctant to handle such a case. Thus a defendant, even if innocent of the RICO charges, would be denied the opportunity to obtain counsel.

The Government's argument that defendants would be able to obtain representation under the Criminal Justice Act, 18 U.S.C. section 3006A, [hereinafter "CJA counsel"], does not resolve the problem. For if a defendant has assets from legitimate sources available to pay counsel, he is not entitled to CJA counsel. The Criminal Justice Act provides for the furnishing of representation to a person "financially unable to obtain adequate representation." 18 U.S.C. section 3006A. A defendant, with money available to pay an attorney, could not lawfully swear under oath, whether in an affidavit or by oral testimony, that he was financially unable to obtain counsel. See Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act (18 U.S.C. section 3006A) for the Southern District of New York, section VI(C) [hereinafter "Plan"]. See also 18 U.S.C. section 3006A. The Government's assertion that it would not contest such an appointment would not remedy the situation. The duty rests upon a judicial officer to determine whether a person is financially eligible for the appointment of counsel and not the United States Attorney's Office. See Plan, section VI(C).

While it is true that defense counsel might question defendant prior to accepting representation in order to determine whether the money to be paid for the legal fee came from legitimate sources as opposed to illicit undertakings, this would not cure the constitutional problems inherent in the forfeiture of attorneys' fees. For if the attorney were to represent the defendant and the defendant were convicted, defense counsel, in challenging the forfeiture of the legal fee, would be required to establish that he had no reasonable cause to believe that the property was subject to forfeiture. 18 U.S.C. section 1963(m). Such disclosure would necessitate the disclosure of privileged matter confided to counsel by his

client. If the attorney were to advise his client of the possible disclosure, the free flow of information required between attorney and client for an adequate defense would be chilled, depriving defendant of effective representation under the Sixth Amendment.

Furthermore, defense counsel in such cases might be considered as having accepted a contingent fee in a criminal case in violation of the Code of Professional Responsibility. See, e.g., Code of Professional Responsibility, McKinney's New York Judiciary Law, Vol 29 [hereinafter "Code of Professional Responsibility"] DR 2-106(C).[1] The attorney's retention of his fee would be dependent on whether or not his client was acquitted. Only if defendant were acquitted would defense counsel be ensured of receiving compensation for the legal services rendered.

Still other ethical problems arise if bona fide attorneys' fees are forfeitable. Defense counsel might seek to negotiate a guilty plea by his client, motivated, not by his client's best interests, but rather by his own desire to avoid forfeiture of his fee. On the other hand, if the Government were unwilling to forego forfeiture of the legal fees in exchange for a guilty plea, the attorney's financial interest might lead him to advise his client to go to trial, hoping for a favorable forfeiture verdict, even if the client's interest in leniency would be served best by pleading guilty. Such actions would violate the attorney's duty to give independent advice solely for the benefit of his client. Code of Professional Responsibility, DR 5-103(A); EC 5-1, 2, 3, 7.

Clearly defendants' Sixth Amendment right to counsel would be violated if attorneys' fees were forfeitable. For even if defendant were able to retain counsel, such representation inevitably would result in conflicts between attorney and client, and deprive defendant of effective representation.

Despite the Government's argument to the contrary, forfeiture of attorneys' fees, or even the threat of such forfeiture, is of greater significance than forfeiture of one's Rolls Royce. Forfeiture of the latter affects only one's property rights, while forfeiture, or the possibility of forfeiture, of attorneys' fees affects, in a very material way, defendant's preparation of his legal defense and the determination of his guilt or innocence. See United States v. Ray, 731 F.2d 1361, 1366 (9th Cir. 1984). This is particularly true in cases as complex as the instant action, where counsel had been retained prior to indictment, have been preparing for trial for several months, and complex issues of law are involved.

The Government, in contending that attorneys' fees are not exempt from forfeiture, relies heavily on United States v. Long, 654 F.2d 911, 916-17 (3rd Cir. 1981) and United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied 105

S.Ct. 133 (1984). But the forfeiture of fees in those actions were not challenged on Sixth Amendment grounds and therefore are of little precedential value for this motion. In addition, in Raimondo, supra, the court held that counsel could still oppose the forfeiture of the property transferred to them. 721 F.2d 478.

This is not to say that moneys paid to or assets transferred to counsel may never be subject to forfeiture. Where property has been transferred to an attorney as part of a sham or fraudulent transaction, or where counsel is merely acting as a nominee for defendant, such property may be subject to forfeiture. The Sixth Amendment does not create a shield permitting counsel to act "as conduits of information or of commodities necessary to criminal schemes or as launderers of money." United States v. Shargel, 742 F.2d 61, 64 (2d Cir. 1984). Since there is no allegation that defense counsel in this action are seeking payment of legal fees for other than legitimately rendered legal services, however, the defendants' Sixth Amendment right to counsel compels the exemption of attorneys' fees from forfeiture.

Restraint of Proceeds

Defendants also have made an application seeking the release of at least a portion of the retained earnings of Consolidated Carting and Fiorillo Brothers earned subsequent to their indictment and restrained pursuant to the ex parte restraining order issued by Judge Palmieri. Defendants argue that without the use of these funds they would be unable to pay their chosen counsel their agreed upon attorneys' fees and thereby be denied the right to counsel of their choice. In addition, defendants contend that because section 1963(a)(1)(A) does not provide for a hearing as required by the due process clause, it is unconstitutional. If the provision is to be deemed constitutional according to defendants, due process requires that the right to a hearing be implied. The Government argues that it is able to restrain the retained earnings but is willing to release some of the funds in order that defendants may pay their attorneys a reasonable attorneys' fees. The Government suggests that a reasonable fee would be eighty dollars per hour.

Any restraint of defendants' assets which render defendants unable to pay their counsel affects their right to choice of counsel.[2] While it is true "[e]conomic realities impose one obvious limitation on defendant's 'right' to be represented by a particular attorney," United States v. Rogers, 471 F.Supp. 847, 851 (E.D.N.Y. 1979), the Government's action in lawfully obtaining an ex parte restraining order has created defendants' financial inability to pay counsel of their choice.

Defendants, who otherwise would have been able to afford counsel, are barred from utilizing these funds to hire counsel of their choice during the period of time in which they are presumed innocent. One court has rejected any distinction between a defendant rendered indigent by the circumstances of life and one who became indigent by the actions of the Government. United States v. Brodson, 241 F.2d 107 (7th Cir.), cert. denied, 354 U.S. 911 (1957). See also United States v. Bello, 470 F.Supp. 723, 725 (S.D. Cal. 1979) (restraining order depriving defendant of counsel of choice upheld).

The right to counsel of one's own choosing is, as previously mentioned, only a qualified right. The protection provided by the right to choice of counsel, however, is no more than preventing arbitrary dismissal of chosen counsel. In Re Grand Jury Subpoena Served Upon John Doe, Esq., 759 F.2d 968, 975-76 (2d Cir. 1985). Any infringement of the right, however, is only to be as a last resort. Id. at 975.

Under the facts and circumstances of this case it is not necessary for the court to determine whether the restraining order is improper because it deprives defendants of their right to counsel of their choice. Counsel for defendants have been preparing for trial for many months. In fact, they had been retained long before an indictment was returned by the grand jury. Additionally, complex issues of law are involved in this case and extensive motions have been submitted on behalf of defendants. Were defendants deprived of their attorneys' assistance in their defense, they would be deprived, in this case, of a necessity in life. If other attorneys were assigned to represent defendants in this stage of the action, additional time would be required to prepare their defense and the new attorneys would not, due to time constraints, be as familiar with the various aspects of this complex criminal case.

The injunction may be modified, as the Government acknowledges, to enable defendants to pay for the necessities in life. As noted by Judge Kane in United States v. Rogers, supra, 602 F.Supp. at 1348 n.5, legal fees to pay counsel of choice is a necessary in life, at least under the circumstances of this case. See also, Wolf v. Friedman, 20 Ohio St. 2d 49, 253 N.E.2d 761, 764-765 (1969) and the cases cited therein.

Therefore the injunction is modified to permit the distribution of the retained earnings of Consolidated Carting and Fiorillo Brothers to pay defense counsel the unpaid portion of their retainers.

Since defendants were seeking the release of the retained earnings in question for the purpose of paying their counsel, it is unnecessary for the court to determine what form of hearing is required after the issuance of an ex parte restraining order. That issue may be left for another day.

CONCLUSION

Defendants' motions are granted. Should a verdict of forfeiture be rendered against defendants after a trial on the merits, the attorneys' fees paid to counsel for legitimately rendered services will not be forfeitable. In addition, because attorneys' fees have been found to constitute necessities, the restraining order of February 15th, 1985, is modified to allow defendants to pay their counsel from the retained earnings of Consolidated Carting and Fiorillo Brothers which were earned subsequent to the indictment.

Dated: New York, New York
September 3rd, 1985

CONSTANCE BAKER MOTLEY
Chief Judge

FOOTNOTES

1. Contingent fees for defense attorneys in a criminal action are void as against public policy. "'In criminal cases, the rule is stricter because of the danger of corrupting justice.'" Code of Professional Responsibility, DR 2-106(C) n.3.

2. Where defendants' funds have been restrained pursuant to a restraining order, rendering them financially unable to afford representation, CJA counsel could be appointed to represent them. Accordingly, if there is a Sixth Amendment violation which arises it would be a violation of the right to counsel of choice.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. M-85-0541
RONALD BURNELL BASSETT CLARENCE MEREDITH	:	
	:	

Filed: April 11th, 1986.

Breckinridge L. Willcox, United States Attorney, and Harvey Eisenberg, Assistant United States Attorney, Baltimore, Maryland, for plaintiff.

Ronald Rubinstein, Rew Gardens, New York, for defendant Bassett.

Leslie A. Stein, Baltimore, Maryland, for defendant Meredith.

MILLER, District Judge.

MEMORANDUM AND ORDER

The defendants Ronald Bassett and Clarence Meredith have moved for an order exempting the fees they are paying their attorneys to represent them in this case from forfeiture to the government pursuant to 21 U.S.C. §§ 848, 853, and 881 (Paper No. 416). The defendants contend that forcing their lawyers to forfeit their fees violates the defendants' constitutional right to counsel of choice; creates a potential conflict of interest between lawyer and client; undermines the attorney-client privilege and poses a threat to the adversary system (id.).

The government argues that the constitutional right to counsel of choice is a qualified right which must give way to the public interest if need be. Further, the government contends forfeiture does not bar defendants from paying their lawyers with assets earned through legitimate enterprises. Finally, the government asserts that the legislative history of the statute indicates Congress did not intend to exempt legal fees from the forfeiture provision (Paper No. 437 at 12-14).

Factual Background

Defendants Ronald Bassett and Clarence Meredith have been charged with conducting a continuing criminal enterprise under 21 U.S.C. § 848 in connection with a conspiracy to possess and distribute heroin. Mr. Bassett was also charged with interstate travel in aid of distributing heroin, possession with intent to distribute heroin and distribution of heroin. Mr. Meredith was also charged with intent to distribute and distribution of heroin and income tax violations (Paper No. 261). On January 27, 1986, Assistant United States Attorney Ty Cobb advised counsel for both defendants by letter that the government intended to seek forfeiture after trial of the legal fees paid to them by these defendants in connection with this matter (Paper No. 416, Exh. 1).

As a result, both attorneys have requested the court to exempt their fees from forfeiture. The lawyers have indicated that their continued appearance in this case is conditioned

on their fees being exempt from forfeiture (Paper No. 416, Rubinstein Affidavit, ¶ 5).

A hearing on this matter took place on April 3, 1986. For the reasons herein stated, the motion of the defendants will be granted.

Legal Analysis

The Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (Oct. 12, 1984), altered existing criminal forfeiture law so as to permit the government to obtain from convicted criminals those assets earned through certain illegal activities even if those assets a) have been transferred to third parties; and b) were transferred to third parties prior to conviction. In other words, the criminal forfeiture "relates back" to the commission of the illegal act which "gives rise to the forfeiture." (Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim. L. Rep. No. 1, 3001 (hereinafter "Justice Department Guidelines")).

The relevant question here is whether the statute's third party forfeiture provisions apply to bona fide legal fees paid by the defendants to their attorneys. Few courts have yet had the opportunity to consider this question in light of the new criminal statute. Two courts which have examined it pursuant to the forfeiture provision of 18 U.S.C. § 1963(m), which is part of the Racketeer Influenced and Corrupt Organizations (RICO) statute and is identical to the forfeiture provision of the drug statute at issue here, have held that attorneys' fees and costs were exempt from forfeiture. United States v. Ianniello, S 85 Cr. 115 (CBM) slip op. (S.D.N.Y. Sept. 3, 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

Another court in the Southern District of New York considered the issue in the context of a motion to quash a Rule 17(c) subpoena and also determined that attorneys' fees could not be forfeited to the government. United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985). In the case of In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 605 F. Supp. 839, 849 n.14 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985), the court in dicta in a lengthy footnote reached the opposite conclusion and said such fees were subject to forfeiture.

Several other courts, including the Fourth Circuit, indicated in dicta in decisions reached prior to the enactment of the new forfeiture statute, that if faced with the question at that time they might have permitted attorney fee forfeiture. See United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, Bello v. United States, 105 S.Ct. 133 (1984); United States v. Long, 654 F.2d 911, 915-17 (3d Cir. 1981). Apparently, however, this is a question of first impression in this District and in the Fourth Circuit.

a) Threshold Issue - Standing and Ripeness

The defendants assert they have standing to challenge the government's intention to seek the forfeiture of the

fees they pay to their lawyers (Paper No. 416, Memorandum at 2). The government has not addressed this issue.

Generally, a plaintiff cannot "rest his claim to (judicial) relief on the legal rights or interest of third parties." Secretary of State of Maryland v. Joseph H. Munson Co., 104 S.Ct. 2839, 2846 (1984) quoting Warth v. Seldin, 422 U.S. 490, 499 (1975). To establish standing, a party wishing to invoke the authority of the court must show he has suffered a real or threatened injury which is fairly traceable to the challenged action and able to be remedied by the court. Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 444 (D. Md. 1985). Thus, when actions affecting a third party impact adversely on the rights of a party to the action, that party has standing to assert his own rights. United States v. Rogers, 602 F. Supp. at 1335 citing Taylor v. Louisiana, 419 U.S. 522, 526 (1975).

Here, the defendants assert their constitutional right to counsel of choice will be impaired if the government is allowed to force forfeiture of their attorneys' legal fees. Clearly, the defendants have standing to assert this claim.

Although not raised by the parties in the pleadings, the question also arises whether the case is sufficiently ripe for decision. Although the government has not actually instituted forfeiture proceedings against these lawyers, it has made it clear that it intends to do so. Moreover, the lawyers in this case have stated that their continued participation in this case is contingent upon their receiving a favorable determination of this matter now. Thus, the defendants face the possibility of being without counsel less than two months before going to trial on extremely serious charges with potentially severe penalties. Therefore, the adverse consequences to the defendants of the government's announced intention is immediate, not an ephemeral potentiality. The issue is ripe for immediate resolution and demands immediate attention from the court.

b) Statutes at Issue and Congressional Intent

The relevant provisions of the applicable forfeiture statutes read as follows:

"§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

> Any person who engages in a continuing criminal enterprise shall be sentenced to a term of ... and to the forfeiture prescribed in section 853 of this chapter;....

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly as the result of such violations;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter (1) of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other pecuniary fees as offence may be fined not more than twice the gross profits or other proceeds.

(4) Meaning of term "property"

Property subject to criminal forfeiture under this section includes:

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(5) Third party transfers

All rights, title, and interest in property described in subsection (a) of this section vesting in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (c) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section ....[11]

Arguably, § 853(c) may be read to reach a very broad class of persons as third party transferees. Fees paid to lawyers are not expressly exempted. Thus, bona fide fees paid to an attorney under the literal terms of the statute seemingly would be subject to forfeiture unless counsel was, as noted in the statute, "reasonably without cause to believe" the fees were as subject.

How is this standard of being "reasonably without cause to believe" to be measured in the case of attorneys? Is the attorney under a duty to inquire as to the source of each client's funds? Is the attorney on constructive notice that a client's funds may be subject to forfeiture if the client has been convicted in the past of drug or RICO offenses? Is indictment under § 848 or RICO sufficient to give an attorney reasonable cause to believe the funds may be subject to forfeiture? Because the statute is not clear on its face in this respect, one must look to the legislative history for further guidance. United States v. Fortunato, 855 F.2. 176, 188 (1987).

Unfortunately, the legislative history of the Comprehensive Crime Control Act does not provide bright illustration of

---

[11] 21 U.S.C. § 853 describes the types of property subject to forfeiture and will not be cited in this text.

transgressional periods as their objects[1]. In doing, however, Corey implicitly also believed (in Foucaultian or Adornian fashion) that scientific and technical (in Foucault's sense) discourses provided a self-authenticated, perfectly-clear basis independently behind transcendent by Enlightenment traditions to which questions, its development has obscured that successive processes of critique (Kant and hermeneutics phenomenon). The mechanism behind is exclusive but to protocol capacity, important transitions to circumstances of modern, do not receive design business independent to transmit information.[2] In Mary Ann, 1253, Mbira-Kinai, 42 Brazil, the [illegible] **Grade Grade-Student** [illegible] 42 1983-4, 3, Grade Study, 1-42. Marie Curie. In such services to Chaucerian-Hobb (the other Corey's protocol) are significantly to involving the principle of transmit protocols.

> Corey, Literary Technical Environment of the Grade Study, 1-42 (Mbira-Kinai: Grade Study, 1983-4).

---

[1] Transcriptions, Appendix 3 of Corey's study, and Appendix 1 of Corey's study, 1-42 (Mbira-Kinai: Grade Study, 1983-4).

[2] Corey's study, 1-42 (Mbira-Kinai: Grade Study, 1983-4).

Mbira-Kinai Grade Study, 1-42 (Mbira-Kinai: Grade Study, 1983-4).

Transcriptions, Appendix 3 of Corey's study, and Appendix 1 of Corey's

difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims in racketeering and narcotics trafficking cases who would be required to testify at the restraining order hearing.

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. In civil forfeitures, such transfers are voidable, for the property is considered 'tainted' from the time of its prohibited use or acquisition. But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable so that improper pre-conviction transfers may be voided.

In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture...."

Senate Crime Report, 195-96; id. at 3378-79 (footnote omitted).

The Senate Report further discusses at some length the purpose behind the amendment concerning third party transfers in the context of Section 1963(c) of the RICO statute. This section, as amended, is identical to the criminal forfeiture provision of § 853(c), and thus the discussion of the RICO amendment is instructive here. It reads in pertinent part:

"The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms length' transactions. On the other hand, this provision should not operate to the detriment of innocent bonafide purchasers of the defendant's property...."

Senate Crime Report at 200-01, id. at 3383-84.

Finally, the Senate Report discusses the mechanics of the third-party criminal forfeiture procedure as outlined in 18 U.S.C. § 1963(m).[3] The Report states:

"...[A] third party will prevail ... where the petitioner acquired his legal interest after the

---

[3]This section is identical to 21 U.S.C. § 853(n). Section 18 U.S.C. §1963(m) reads as follows:

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture."

Senate Crime Report at 209, id. at 3392. A footnote to that passage, however, offers a somewhat contradictory caveat. "The provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. 1963(c), as amended by the bill." (Emphasis supplied). Senate Crime Report at 209, n.47, id. at 3392.

---

footnote #3 cont'd.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(As amended Pub.L. 98-473, Title II, SS 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040, 2192).

c) Case Law Analysis

In analyzing the legislative history of the statute in the context of a RICO forfeiture action, the court in United States v. Rogers reached the following conclusion:

> "An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered."

602 F. Supp. at 1348.

Likewise, in the Ianniello decision the court relied on its interpretation of the legislative history to reach the conclusion that "bona fide attorneys' fees paid to defense counsel who serve the defendants' needs within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture." Ianniello, slip.op. at 8-9.

The court in the Badalamenti decision acknowledged that a literal reading of 18 U.S.C. § 1963(c) and 21 U.S.C.

§ 853(c) appeared to include the payment of legal fees. 614 F. Supp. at 196. The court determined, however, that such a conclusion would raise insurmountable constitutional problems for the client and ethical concerns for the attorney. Id.

The government contends that "these decisions are incorrect." Justice Department Guidelines, 38 Cr.L. at 3002. The statute on its face fails to establish any exemption for legal fees, according to the government. Further, the government notes that the Senate report cited by the Rogers, Ianniello, and Badalamenti courts also cited with approval the decision of United States v. Long, 654 F.2d 911 (3d Cir. 1981), Justice Department Guidelines, 38 Cr.L. 3003. In Long, an airplane, owned by the defendant convicted of a continuing criminal enterprise in connection with his involvement in an international drug smuggling enterpise, was determined to be forfeitable even though it was transferred to the defendant's attorney before the defendant's conviction. The attorney then attempted to sell the plane. 654 F.2d at 913, 917. The case was cited by the Congress as an example of an effort to transfer forfeitable assets. Senate Crime Report at 200, n.28 198, 4 U.S. Code Cong. & Ad. News (1984) at 3383.

The government also relies on dicta in In re Grand Jury Subpoena, supra, to support its position. In discussing the matter before it, which was a motion to quash a subpoena for information on attorneys' fees served on counsel for a defendant charged with a continuing criminal enterprise, the court stated that fees paid to his attorney were forfeitable. Also analyzing the legislative history, the court stated the lawyer was on notice, as required by the statute, from the moment he read the indictment that the defendant's assets were subject to forfeiture. 605 F. Supp. at 849-50, n.14. "One who receives funds with the knowledge that the funds are subject to forfeiture cannot be said to have entered into an arms length transaction regardless of the price paid for the good or service." Id. at 849. Further the court stated:

> "Fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprise. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same funds."

Id. at 850.[4]

The Fourth Circuit tangentially examined this issue in the Raimondo decision. In this case, a couple, James and Carol Bello, and Paul Raimondo were convicted of a conspiracy to distribute cocaine. James Bello was also convicted of engaging in a continuing criminal enterprise. 721 F.2d at 477. Carol and James Bello challenged the forfeiture to the government of the profits from three of James Bello's properties which were held by Carol Bello and the couple's lawyer. Id. The court determined that Mrs. Bello was involved in her husband's activities and aware of the criminal source of his assets. The lawyer was on notice of the forfeiture potential from reading the indictment. Id. at 478. Therefore the proceeds held by both were forfeitable. Id.

The court specifically stated, however, that its decision in Raimondo was not final as to the lawyer. "Our disposition of this case does not bar Rosen (Bello's lawyer) or his law firm from opposing the government's forfeiture of the realty conveyed to them. Neither Rosen nor his law firm is a party to this criminal action, and our decision is not res judicata with respect to them." Id.

The legislative history of the criminal forfeiture amendments to the Crime Control Act is, at times, contradictory. It can legitimately be subject to varying interpretations. Nonetheless, it is reasonable to conclude that the problem faced by lawmakers, and the problem they sought to remedy, was that of defendants purposefully hiding assets arguably subject to forfeiture to avoid relinquishing them to the government. A reasonable inference to be drawn is that it is such sham, fraudulent transactions which Congress specifically intended to single out for remedy. The attorney representing a client under indictment for a RICO violation or a continuing criminal enterprise drug-related offense is certainly not "innocent" of knowledge that the money with which he is paid might be tainted. He is certainly not, however, just a bogus conduit for this money when providing bona fide legal services.

---

[4]The Rogers and In re Grand Jury Subpoena courts also considered the meaning of a passage in a House Judiciary Committee report discussing a provision in the amended drug control act relating to the use of pretrial restraining orders in connection with in personam forfeitures. The Rogers court noted that the House panel stated: "'[n]othing in this section [dealing with in personam forfeiture] is intended to interfere with a person's Sixth Amendment right to counsel.' Hse. Rep. 845, part 1, 98th Cong., 2d Sess., Rept. of the Committee on the Judiciary Concerning Comprehensive Drug Penalty Act of 1984, p. 19 n.1." 602 F. Supp. at 1347-48.

The court in In re Grand Jury Subpoena contended "[t]his reliance [on the above quoted House panel passage] ... is misplaced" and quoted from the next sentence of the report: "'[t]he Committee, therefore does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case.'" 605 F. Supp. at 850, n.14. The court continued: "Clearly, Congress intended, not to resolve the sixth amendment conflict through this legislation, but to leave the resolution of these issues to the courts." Id.

The Badalamenti court also injected itself into this debate by asserting that In re Grand Jury Subpoena has improperly interpreted the quoted passage. "In my view, the sentence noted ... addresses a different problem. It is the difficulty the accused may experience in hiring and paying a lawyer if the funds of the accused have been sequestered in anticipation of eventual forfeiture." 614 F. Supp. at 197.

This interpretation of the statute is further supported when one considers the constitutional implications of the government's position. As stated by the court in Ianniello, "in deciding among possible interpretations of a statute, the court must select an interpretation that appears to be consistent with the constitutionality of the statute." Ianniello, slip.op. at 9, citing Gutknecht v. United States, 396 U.S. 295 (1970); United States v. Rumely, 345 U.S. 41, 45 (1953).

The constitutional principle at issue here, of course, is the Sixth Amendment right to counsel. The Sixth Amendment provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The right to counsel is of such importance "that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" Powell v. Alabama, 287 U.S. 45, 67 (1932), quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926). See also United States v. (Under Seal), 774 F.2d 624, 627 (4th Cir. 1985). The right to counsel also includes the right to counsel of choice, provided the person seeking counsel has the resources to pay an attorney. United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974).

The government agrees that "[a] defendant is entitled only to counsel of choice whom he can afford." Justice Department Guidelines, 38 Cr.L. at 3002, citing United States v. Rogers, 471 F. Supp. 847, 851 (E.D.N.Y. 1979). Consequently, the government contends that "the qualified right to counsel of choice ... (does not include) the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity." Justice Department Guidelines, 38 Cr.L. at 3002.

The defendants in the instant case, Mr. Bassett and Mr. Meredith, are apparently wealthy enough to hire counsel of choice. They are under indictment for their alleged participation in a continuing criminal enterprise. If it is determined that the money they pay their lawyers is forfeitable under the statute, then for all intents and purposes, despite their current wealth, they will be unable to hire counsel of choice. From the moment they walk through any law firm door, counsel inside are on notice, simply by virtue of the nature of the indictment, that any work done for these clients will be at least possibly done free. Even accepting, arguendo, the contention of the government that there is no right to use the proceeds of criminal activity to obtain counsel, at this point in time the funds of Mr. Bassett and Mr. Meredith cannot be ineluctably considered proceeds of criminal activity, because they have not yet been convicted of this crime. Although the "relation back" aspect of the

forfeiture statute is only triggered by conviction, the practical effect is that if forfeiture is applied to attorneys' fees the true impact is felt prior to conviction. Despite the legal profession's commitment to pro bono work, it is doubtful that attorneys would be willing to invest the many hours of legal work necessary to defend against these serious charges without a more substantial hope of remuneration than the government is willing to concede.[5]

As stated by the court in the Badalamenti decision, if the statute applies to attorneys' fees, the message is

> "'Do not represent this defendant or you will lose your fee.' That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation. By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of the RICO and CCE statute (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business."

614 F. Supp. at 196.

---

[5]The defendants' counsel in this case argue that should they agree to represent these defendants without an order from the court exempting their fees, they are essentially violating attorney ethics rules (Paper No. 416, Memorandum at 9). The Code of Professional Responsibility states, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." Md. Code of Prof. Resp., DR 2-106(c). The contingency here, of course, is that the lawyers will only get paid if the defendants are acquitted or convicted of a lesser charge.
Further, to continue representing these clients under these circumstances would also place these attorneys in conflict with the best interests of their client, they contend. Their "fees will be safe only in the event of an acquittal or a plea bargain that includes a Government promise not to seek forfeiture of fees." (Paper No. 416, Memorandum at 9). The advice they give their clients could be influenced by this fact.

The government suggests the defendants use non-forfeitable legitimate assets to pay their attorneys (Paper No. 437 at 13). This solution again presumes guilt before conviction -- no assets are forfeitable until the defendant is found guilty of the crime. As a practical matter, if the defendants a found guilty and their illicit assets are forfeitable, they are unlikely to have segregated their "good" assets from the tainted. Moreover, the government's solution is undercut by its own contention that once it obtains forfeiture, it need not "trace" the tainted money. This latter position is supported by case law. "It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known." United States v. Conner, 752 F.2d 566, 576 (11th Cir.), cert. denied, Taylor v. United States, 106 S.Ct. 72 (1985). Thus, this does not appear to be a realistic option.

The government also contends that the defendant may seek to have counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A. See United States v. Bello, 470 F. Supp. 723, 725 (S.D.Cal. 1979). But the Rogers court said this was no more than "lip service to due process and the right to counsel." 602 F. Supp. at 1349. The court stated that the complexity of RICO cases would strain resources and probably be beyond the expertise of the already "overtaxed" federal public defenders' offices. Id. While this latter

conclusion is probably overstated, it is true, as observed by the Badalamenti court, "[t]he wealthy defendant cannot claim poverty and apply for appointed counsel. His problem is not inability to pay a legal fee but that lawyers will refuse to accept his retainer and will refuse to represent him. He can get neither a paid lawyer, nor a free one." 614 F. Supp. at 197.

Finally, the Rogers court indicated that the government's interpretation of the forfeiture provision posed a serious threat to the adversary process. "The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses." 602 F. Supp. at 1350.

To read the statute as including in the forfeiture provision the fees of attorneys is to violate Sixth Amendment principles. Therefore, this court will follow the holdings of the Ianniello, Badalamenti, and Rogers decisions and determine that Congress did not intend the statute to encompass fees to attorneys paid for the legitimate rendering of professional services. Any attempt by a defendant simply to use an attorney to funnel or hide illicit funds outside of a legitimate fee arrangement for services rendered would, of course, not protect those funds from forfeiture. See Badalamenti, 614 F. Supp. at 198. There is no hint in this case that Mr. Bassett or Mr. Meredith are paying for anything other than legitimate lawyer services.

In reaching this decision, the court is not ignoring conflicting precedent established in this, or any other circuit. The Raimondo decision of the Fourth Circuit specifically left open the possibility of a challenge by the defense lawyers to the forfeiture. Therefore, the court there did not examine any of the constitutional ramifications of construing the statute to include attorneys' fees. 721 F.2d at 478.[6] Additionally, Raimondo was decided before the forfeiture provisions were amended in 1984 and thus without the benefit of the legislative history on which this court has relied.

In the Third Circuit's Long decision, upholding a restraining order on the transfer of an airplane to the defense lawyer, the facts strongly suggest a sham transaction. The airplane was in payment of past debts for services and as a retainer for future expenses. The defendant and lawyer reached an oral agreement of $140,000 for the price of the plane. In exchange for the plane, the lawyer gave an unknown messenger $31,000 in cash to give to the defendant, credited the defendant with having paid $79,000 for future services and forgave $30,000 in defendant's unpaid legal debts.

---

[6] In the Bello decision, a case decided in the Southern District of California, the court upheld a pretrial restraining order preventing the defendant under indictment for a RICO violation from disposing of certain assets. The defendant contended the order would render him unable to hire counsel. 470 F. Supp. at 724-25. The Bello court, like the Raimondo court, did not examine the potential Sixth Amendment problems. Instead, it merely concluded counsel could be appointed if the defendant had no money. Id. at 725.

The defendant executed a power of attorney in favor of the attorney's law firm for the purpose of transferring title to the plane. Title was transferred to the attorney's partner by an individual named "Tony" in the Bahamas. The law firm then attempted to sell the plane through advertisements in trade magazines. Issuance of a restraining order stopped the sale. 654 F.2d at 913.

These facts, under the current statutes, might well be considered the substance of a sham transaction subject to forfeiture. Therefore, the Long decision cannot be read as undermining this court's ruling today.

Accordingly, it is this 11th day of April, 1986, by the United States District Court for the District of Maryland, ORDERED:

1. That defendants' motion to exempt legal fees from forfeiture be, and the same is hereby, GRANTED.

2. That it is hereby DECLARED the government may not seek the forfeiture of legitimate attorneys' fees incurred and paid to Leslie Stein, Esq., attorney for Clarence Meredith, or Ronald Rubinstein, Esq., attorney for Ronald Bassett, for representation of said defendants against the charges set out in the indictment and superseding indictment in this case.

3. That the government is hereby ENJOINED from seeking the forfeiture of legitimate attorneys' fees incurred and paid to Leslie Stein, Esq., attorney for Clarence Meredith, or Ronald Rubinstein, Esq., attorney for Ronald Bassett, for representation of said defendants against the charges set out in the indictment and superseding indictment in this case.

4. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

James R. Miller, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 85-00010-A
	)	
CHRISTOPHER F. RECKMEYER, II, et al.	)	
	)	

(Caplin & Drysdale Chartered, Petitioner)

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED:

(1) that the Orders of Forfeiture of March 14, 1985, May 17, 1985, and June 5, 1985, are AMENDED to reflect that the firm of Caplin & Drysdale has a legal right, title, and interest in the sum $170,512.99 out of the forfeited assets of Christopher Reckmeyer;

(2) that the Clerk shall forward certified copies of this Order to all counsel of record.

Dated: 3/27/86
Alexandria, Virginia

United States District Judge

Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 85-00010-A
	)	
CHRISTOPHER F. RECKMEYER, II, et al.	)	
	)	

MEMORANDUM OPINION

This matter is before the court on the Petition of the law firm of Caplin & Drysdale Chartered ("Caplin & Drysdale") who seek a modification of the forfeiture order entered by the court on May 17, 1985, to permit payment of defendant Christopher Reckmeyer's attorneys' fees. This case presents a conflict between the forfeiture of drug related assets under the Comprehensive Forfeiture Act of 1984 and a defendant's right to counsel under the Sixth Amendment to the Constitution. For the reasons set forth below, the Petition is granted.

I

The basic facts are not in dispute.

The law firm of Caplin & Drysdale began representing Christopher Reckmeyer in the summer of 1983, in connection with a grand jury investigation of drug trafficking activities in the Eastern District of Virginia which culminated in an indictment issued against Reckmeyer and twenty-five other individuals on January 15, 1985. As of December 31, 1984, Reckmeyer owed Caplin

Attachment no. 198

& Drysdale $26,444.97 for services rendered and costs incurred through that date.

On January 14, 1985, this court issued an Order pursuant to an ex parte application by the government which restrained the transfer of assets by Reckmeyer and others. On January 25, 1985, Christopher Reckmeyer surrendered. At his request, Caplin & Drysdale continued to represent him in his defense of the indictment. On March 14, 1985, Christopher Reckmeyer plead guilty to Count 2--engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. He also plead guilty to Counts 26 and 31, which charged violations of Federal tax laws.

On March 15, 1985, oral argument was held before Judge Bryan of this court on Reckmeyer's motion filed on March 7, 1985, for an order modifiying the restraining order of January 14, 1985, to exclude attorneys' fees from forfeiture. Judge Bryan denied this motion on March 15, 1985, on the ground that Reckmeyer had plead guilty to Count 2 on the previous day. Judge Bryan stated, however, that Caplin & Drysdale could, on its own behalf, raise the issue of forfeitability of attorneys' fees in the context of a third-party petition.

On May 17, 1985, Reckmeyer was sentenced to a period of incarceration, and a Forfeiture Order was entered listing virtually all assets possessed by Reckmeyer, including real estate, gems and $200,000 in United States currency. The Forfeiture Order specifically included:

> 29. All monies and funds restrained by January 14, 1985, restraining order entered in the above styled case, including but not limited to the approximately $25,000 held in escrow by Bernard S. Bailor [a member of the law firm of Caplin & Drysdale] and/or his agents.

Forfeiture Order dated 5/17/85.

In defending the charges against Reckmeyer, Caplin & Drysdale incurred the following expenses and time charges:

a. Disbursement for the retention of Stanley J. Reed of Lerch, Early, Roseman & Frankel to assist in Reckmeyer's defense. Mr. Reed was retained in order to comply with the requirements of Canon 6, ABA Code of Professional Responsibility because Caplin & Drysdale was not experienced in defense of drug cases. (Exhibit G.)	$ 46,975.54
b. Other disbursement in connection with the defense (duplicating, telephone, investigators, etc.) (Exhibit H).	$ 14,313.95
c. Caplin & Drysdale attorney time charges. (Exhibit H).	$109,223.50
Total Expenses	$170,512.99

In rendering these services to Reckmeyer, Caplin & Drysdale was a good faith provider of services for value. Caplin & Drysdale has not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets. Pursuant to 21 U.S.C. § 853(n)(2), Caplin & Drysdale filed its Petition to the court for a hearing to adjudicate the validity of their interest in the forfeited assets.

II

Caplin & Drysdale argues that the forfeiture statute was not intended to reach legitimate attorney's fees, and therefore they are entitled to be paid the fees and costs incurred in representing Christopher Reckmeyer. They further argue that any construction of the forfeiture statute which reaches legitimate attorney's fees would violate a criminal defendant's Sixth Amendment Right to Counsel. The government argues that the attorneys only have standing to contest the forfeiture of $25,444.97 actually delivered to them by Reckmeyer but do not have standing to contest the balance owed by Reckmeyer. They further argue that the forfeiture statute can be plainly read to encompass attorney's fees and that the court should not order the government to pay the defendant's attorney of choice out of funds which rightly belong to the government under the relation-back principle of Section 853(c).

a. Standing

Under the Forfeiture Act, the disposition of third-party claims is governed by 21 U.S.C. § 853(n)(6). This section provides:

> (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.

The government argues that petitioners do not have standing to contest the Order of Forfeiture under Section 853(n)(6). The government position is that petitioners cannot claim either a superior right, title or interest "at the time of the commission of the acts which gave rise to the forfeiture," 21 U.S.C. § 853(n)(6)(A), or that they are "bona fide purchaser[s] for value" who were "reasonably without cause to believe that the property was subject to forfeiture," 21 U.S.C. § 853(n)(6)(B).

The legislative history of the criminal forfeiture statute provides: "Third parties who assert claims to criminally forfeited property, which in essence are challenges to the validity of the order of forfeiture, are entitled to a judicial determination of their claim." S. Rep. No. 225, 98th Cong., 1st. Sess. 208 (1983). It is clear from the Senate Report that petitioners' claims fall within the scope of persons which Congress recognized as being "entitled to a judicial determination of their claim," even though they cannot specifically make a claim for relief under Section 853(n)(6). The court having found petitioners to be a good faith provider of

services, it follows that they have a legal interest in the property forfeited. Their status is, at least, equal to that of a general creditor, and therefore the court finds that they do have standing to present their claims.[1]

b. Sixth Amendment

The court having found that the petitioners have standing, the question before the court is whether counsel fees and costs are exempt from forfeiture under the Comprehensive porfeiture Act of 1984, 21 U.S.C. § 853.

Four other district courts have addressed this issue, albeit in a pretrial context. In United States v. Rogers, 602 F. Supp. 1332 (D. Col. Feb. 22, 1985), the government filed a petition for an order restraining transfer of property by defendants under an indictment alleging forfeiture under the Comprehensive Forfeiture Act of 1984. The court held that attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions. In In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F. Supp. 839 (S.D.N.Y. March 11, 1985), the court refused to quash a government subpoena seeking information regarding defense counsel's fee arrangement with defendant in order to obtain information regarding potentially forfeitable assets. In addressing the question of forfeitability, the court, specificly declining to follow Rogers, held that the government is entitled to a preliminary order restraining attorney's fees under the Comprehensive Forfeiture Act. In United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. July 10, 1985), the court, in ruling on a defendant's motion to quash a trial subpoena duces tecum served upon defense counsel, held that the government may not seek a special verdict as to the forfeiture of attorney's fees under 18 U.S.C. § 1963 or 21 U.S.C. § 853 and may not rely on forfeiture in support of the subpoena at issue. Finally, in United States v. Ianniello, 85 Cr. 115 (S.D.N.Y. Sept. 3, 1985) (slip op.) the defendants sought and obtained an order declaring that attorneys' fees are exempt from forfeiture under 18 U.S.C. § 1963.[2]

This court agrees with the reasoning of the Rogers, Badalamenti, and Ianniello courts, and does not believe that

---

[1] This ruling is consistent with the court's ruling on the Petition of William Beckmeyer in which it held that Section 853(n)(6)(A) provided standing for all general creditors to make claims which may rebut the government's presumption of forfeitability under Section 853(d). See Memorandum Opinion dated February 5, 1986, at 13. The only difference here, is that the petitioners are challenging the reach of the entire forfeiture statute as it applies to attorney's fees and not the forfeitability of property under a particular section of the statute.

The court would also further note that counsel in its representation of William Beckmeyer did raise this issue before Judge Bryan of this court in the form of a motion for modification of the ex parte protective order obtained by the government. At that time, Judge Bryan told counsel they could present their claims in the form of a third-party petition under Section 853(n). In light of these facts, the court thinks it would be unfair to not give petitioners standing at this time to hear their claims.

[2] 18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853.

Congress intended that the Comprehensive Forfeiture Act of 1984 would encompass bona fide legal fees paid to a criminal defendant's attorney. Such an application of the Act would in all likelihood violate the Sixth Amendment while not furthering any Congressionally desired ends of the statute. Absent some clear indication in the statute or legislative history that Congress did address this issue, it seems inconceivable that they intended the Forfeiture Act to be applied in this manner.

As the court noted in Badalamenti, a literal reading of Section 853 would seem to encompass legal fees. Section 853(a) provides that any person convicted of a violation of the federal drug laws shall forfeit "any property" which constitutes a proceed or was used to facilitate the criminal activity or, in the case of a person engaging in a continuing criminal enterprise, "any of his interest in, claims against, and property or contractual rights affording a source of control over" the enterprise. 21 U.S.C. § 853(a) (emphasis supplied). The statute does not specifically exempt counsel fees. The legislative history of the statute does, however, touch on this issue. The House Judiciary Committee Report states:

> Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case.

H.R. Rep. No. 845, pt. 1 98th Cong., 2nd Sess. 19 n.1 (1984). This passage, appears to modify the broad language in the statute so that it will not be read as a Congressional affirmation that forfeiture of attorney's fees is constitutionally permissible. It appears that Congress did not intend to take a position regarding the forfeitability of attorney's fees through this legislation, but rather decided to leave the resolution of this issue to the courts. In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F. Supp. at 849-50 n.14. The broad language of the Section 853(a), which speaks in terms of "any property" of the defendant, should not therefore be read as a Congressional statement that attorney's fees in a criminal case are subject to forfeiture under this Act. This court's finding that the forfeiture of attorney's fees violates the Sixth Amendment is therefore not inconsistent with the Congressional intent behind the Comprehensive Forfeiture Act, it appearing that it was Congress' intent all along that the courts would resolve this question.

The application of Section 853 to encompass bona fide attorney's fees would violate a defendant's Sixth Amendment rights in two ways. First, it would violate the defendant's right to obtain counsel of his choice. Powell v. Alabama, 287 U.S. 45, 53 (1932); United States v. Inmann, 483 F.2d 738 (4th Cir. 1973) (Sixth Amendment includes right to reasonable opportunity to obtain, and be represented by an attorney of one's choosing where defendant can do so from his own resources). Second, it would create inherent conflicts of interest between the attorney and his client, and would chill the free flow of information between attorney and client, resulting in a deprivation of the defendant's right to effective assistance of

counsel. See Strickland v. Washington, 104 S.Ct. 2052 (1984); United States v. Ianniello, slip op. at 12-13; United States v. Rogers, 602 F. Supp. at 1349.

It cannot be disputed that the application of the third-party forfeiture provisions to attorneys' fees will restrict a defendant's ability to obtain counsel of choice. See Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim. L. Rep. (BNA) 3001, 3002 (Oct. 2, 1985). Indeed, the notice provisions of Section 853(n)(6)(B) and the "relation-back" doctrine of Section 853(c), as construed and applied by the government, will deprive a defendant of counsel of choice no less effectively than if the government simply prohibited a defendant from hiring a lawyer. Attorneys will not represent a defendant if they know that, upon his conviction, their fees will be subject to forfeiture or that, as in the instant case, due to a restraining order, they cannot be compensated for legal services rendered prior to and including trial, and are later prohibited from asserting an interest in fees which otherwise would have been paid.

The right to obtain counsel of one's choosing is not absolute, but "must be carefully balanced against the public's interest in the orderly administration of justice." Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981). See also United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978) (counsel of choice may only be deprived where compelling need to assure prompt effective and efficient administration of justice); United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983) (prosecution must show important interest adversely affected by permitting chosen counsel to proceed).

In this court's opinion, there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their "economic bases" upon conviction. See S. Rep. 98-225 at 191; see also Russello v. United States, 104 S. Ct. 296, 299 (1983). The relation-back provision of Section 853(c) authorizes the court to set aside illusory or fraudulent transfers so that a defendant cannot, prior to conviction, avoid forfeiture by transferring assets to a nominee. See S. Rep. 98-225 at 209 n.47. Exempting legitimate attorney's fees from forfeiture would not undermine these purposes because "[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham." United States v. Rogers, 602 F. Supp. at 1348, and therefore a defendant who is found guilty will still be separated completely from his economic base.

Subjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice. The forfeiture of attorney's fees would likely cause chosen counsel to withdraw, leading to delays, disruption of the criminal proceeding, and further creating serious problems for already overburdened public defenders. It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since

that Act places limits on the amount which can be paid as attorney's fees.[3] Finally, subjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is "on notice." Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable. See United States v. Rogers, supra, 602 F. Supp. at 1350 (application of forfeiture provisions to attorney's fees violates due process because: "The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries"). Ultimately, therefore, forfeiture of attorney's fees would undermine the adversary system itself, by producing an imbalance of powers that would violate the due process clause of the Fifth Amendment. See Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser"); Gandy v. Alabama, 569 F.2d 1318, 1321 (5th Cir. 1978) (defendant's due process protection includes "fair opportunity to be represented by counsel of his own choice").

As the court stated in Badalamenti, the denial of choice of counsel is only the beginning of the problems that the government's position would raise. The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. See Strickland v. Washington, 104 S. Ct. 2052 (1984); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir.) cert. denied 451 U.S. 938 (1981).

Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity; the attorney's obligation to negotiate a guilty plea which is in his client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture; the attorney's desire to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture" would conflict with his obligation to maintain his client's confidences. United States v. Badalamenti, 614 F. Supp. 194, 196-197 (S.D.N.Y. 1985).

---

[3] The availability of court-appointed counsel under the CJA is also inadequate because, due to threat of forfeiture of attorney's fees, individuals would be deprived of the opportunity to obtain any legal representation before they are officially charged or rendered "financially unable" to hire their own counsel. Thus, during the pendency of a grand jury investigation, a defendant, who is not only presumed innocent but has not even been charged with a crime, could not obtain the advice of counsel on such matters as whether to assert his Fifth Amendment rights.

The possibility of an attorney appearing as a third-party petitioner in a Section 853(n) hearing also undermines the attorney-client relationship, further impinging on the right to counsel. The threat of an attorney having to disclose information obtained from his client will chill the openness of attorney-client communications. Rogers, 602 F. Supp. at 1349. If an attorney advised his client of the possible ramifications of the disclosure of this information to him, the free flow of information would be even further chilled depriving the defendant of effective representation. Ianniello, slip op. at 12-13.

In summary, the court finds that the Comprehensive Forfeiture Act does not encompass the forfeiture of bona fide attorney's fees of the defendant. Such a construction of the statute would violate the Sixth Amendment, and is not contrary to the legislative intent of Congress. Having already found that Caplin & Drysdale was a good faith provider of services for a value of $170,512.99, the court will direct the government to pay Caplin & Drysdale $170,512.99 out of the forfeited assets of Christopher Reckmeyer.

An appropriate Order will issue.

Dated: 3/27/86
Alexandria, Virginia

United States District Judge

Attachment no. 5

ANALYSIS AND RECOMMENDATIONS ON THE
COMPREHENSIVE FORFEITURE ACT OF 1984.

The Comprehensive Forfeiture Act of 1984 (the "CFA") has advanced the important law enforcement goal of taking the profit out of crime by clarifying and expanding the scope of criminal forfeitures under federal criminal law. Some of the statutory language used in the Comprehensive Forfeiture Act, however, has fostered increased uncertainty in the practical application of this enhanced prosecutorial weapon. In addition, some of the new statutory language has proven amenable to prosecutorial uses not within the expressed contemplation of the 98th Congress. These new uses of the criminal forfeiture law promise to recast dramatically the shape and substance of our criminal justice system. While the NACDL supports the agenda of taking the the profit out of crime, we respectfully request that Congress take affirmative steps to preserve the adversary character of the criminal justice system which has well served our country for almost two centuries.

The forfeiture of legitimately earned legal defense fees is but one prominent example of the broad new powers that the Department of Justice has asserted under authority of the CFA's statutory language. In a specific case, the federal government has also claimed the statutory right to deprive the defendant of all living expenses during the pendency of criminal proceedings. See United States v. Thier, Crim.No. 84-60055-23, slip. op. (W.D. Louisiana Oct. 29, 1985) (affirming government contention that no exception for necessary living expenses exists under CFA to permit modification of pretrial restraining order barring defendant's use of all monies under his control). Finding no guidance from the language and legislative history of the CFA, courts have strived to further Congress's announced goal while preserving the basic fairness of our system of criminal justice. See, e.g., United States v. Reckmeyer, No. 85-00010-A, slip. op. (E.D. Va. March 27, 1986); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); United States v. Ianniello, No. S85 Cr. 115 (CBM) (S.D.N.Y. 1985). Confronted with both silence and inconsistency in the statute itself, courts have reach conflicting conclusions about the proper scope of the criminal forfeiture laws. The NACDL respectfully requests that Congress re-examine some the language used in the CFA to correct the inconsistencies, remove any constitutional infirmities, and render the federal law of criminal forfeiture consonant with the original intentions of the 98th Congress.

Specifically, the NACDL directs the attention of Congress to four areas where reform in the criminal forfeiture provisions of the CFA is warranted.

I. The need for a statutory definition of the relation back doctrine.

II. The absence of an essential service or necessary expense exception permitting a defendant to maintain assets during the criminal proceedings and to allow expenditures for necessary living costs.

III. The inconsistency between the statutory prohibition on the use of state law and the necessary use of state law to establish standing to seek post-trial relief from the forfeiture judgment.

IV. The rejection of a "substitute assets" form of criminal forfeiture by the 98th Congress in contrast with the subsequent opinions from two Circuits permitting the government to forfeit legitimate assets of the defendant as a substitute for unavailable forfeit assets.

I. The Need for a Statutory Definition of the Relation Back Doctrine.

The relation back doctrine has a long history under the civil forfeiture laws in this country. Prior to the CFA in 1984, however, the relation back doctrine was not applied to criminal forfeitures. As a legal doctrine, it is deceptively simple. The doctrine is a title-vesting legal fiction whereby title to an asset used in violation of the law is transferred from the owner to the government as of the moment the asset is used unlawfully. Of course, the government does not acquire this title until it has proven its claim that a piece of property is forfeitable. See United States v. One 56-foot Yacht Named Tahuna, 702 F.2d 1276, 1279 (9th Cir. 1983).

In civil forfeiture law, this doctrine has a very uncomplicated application. To initiate a civil forfeiture the government must first seize the offending piece of property (the "res") in order to bring the defendant property under the in rem subject matter jurisdiction of a federal court. Once seized, the government then "prosecutes" the allegedly guilty property. If the government is successful, the government's now perfected claim of title will relate back to the moment that the property was unlawfully used. Simons v. United States, 541 F.2d 1351-52 (9th Cir. 1976). The "relation back" doctrine thus provides the government with a complete defense to claims of subsequent purchasers of the specific piece of property. Because the court proceeds under its in rem jurisdiction, the successful prosecution of a civil forfeiture case by the government conclusively resolves all claims of title to the identified res.

The simplicity of the relation back doctrine under civil forfeiture law is based on the fact that the scope of the forfeiture sanction is never in dispute. Instead, the government's entitlement to forfeiture of the seized property is the central inquiry. From the initial seizure, to the conclusion of the civil proceedings, no doubt exists as to the quantity of property involved in the government's civil forfeiture claim. In civil forfeiture proceedings, then, the relation back doctrine is not used to expand the scope of the government's forfeiture allegations because this scope has already been circumscribed by the in rem jurisdiction of the court.

In criminal forfeiture proceedings, by contrast, the court exercises in personam jurisdiction over the defendant. The appropriate scope of the criminal forfeiture is a central issue in the criminal proceedings. The government must establish not only the defendant's guilt but also the appropriate statutory connection between the defendant's conduct and the allegedly forfeitable asset. See United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983) (government must prove required nexus between property and defendant's conduct beyond a reasonable doubt), cert. denied, 465 U.S. 1005 (1984); United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), aff'd on other grounds, 105 S. Ct. 2407 (1985). An asset becomes forfeitable only if it was used or obtained in a proscribed fashion by a guilty defendant.

As a result, the preliminary issue of asset forfeitability is much more complicated in a criminal forfeiture trial than in a civil forfeiture proceeding. Indeed, the inherent difficulty in applying the relation back doctrine to a criminal forfeiture led early English common law to limit the application of the relation back doctrine to forfeitures of realty. 2 W. Blackstone, Commentaries * 421. As Blackstone stated:

> And this forfeiture [of chattel] commences from the time of conviction, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them,

> must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz.c.5.

Id. (emphasis added).

Instead of beginning with a limited set of property claims as identified by their seizure in a civil forfeiture, a criminal forfeiture begins with the government usually alleging a lengthy list of assets roughly paralleling the length of the defendant's allegedly illegal conduct. Each alleged criminal transaction may in turn give rise to a different quantity of forfeiture depending on the strength of the government's forfeiture allegations and proof. Moreover, unlike civil forfeitures where the government has already seized the full quantity of allegedly forfeitable property before initiating forfeiture proceedings, the lengthy period of time between the alleged criminal act rendering an asset criminally forfeitable, the detection of the crime, the prosecution of the defendant, and a jury's finding of asset forfeitability, guarantee that numerous third parties will have property interests affected by the subsequent forfeiture determination. Accordingly, because the forfeiture scope is a more complicated issue in a criminal forfeiture trial, application of the relation back doctrine is much more problematic.

The current statutory codification of the relation back doctrine does not contain any definition describing the appropriate scope of the doctrine in a criminal forfeiture trial. The statutory language merely provides that title "vests in the United States upon the commission of the act giving rise to forfeiture." 18 U.S.C. §1963(c); 21 U.S.C. §853(c). Of course, the failure to identify what is the operative "act giving rise to forfeiture" constitutes a facial ambiguity. The principal definitional defect in this provision, however, is the absence of any criteria to govern its practical application in a specific case.

For example, suppose a guilty defendant obtained illicit proceeds in a transaction four years ago. Further suppose that the defendant was properly indicted and convicted of an offense which makes these proceeds forfeitable to the government. In the intervening four years the defendant has used this money to buy a car, to put his child through college, to pay medical bills, and to pay his mortgage. Because each of these payments can be traced to the original illegal proceeds, all of these payments may fall within the literal reach of the relation back doctrine and are therefore arguably subject to forfeiture under the current statutory language.

Plainly, however, Congress did not wish to recast every completed transaction of the defendant solely to increase the government's forfeiture verdict. The purpose of the forfeiture statute is punitive, not pecuniary. No punitive purpose is furthered by subjecting numerous innocent third parties to the vicissitudes of appearing after trial to demonstrate their bona fides. Instead, the legislative history of the CFA states that: "The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers which were not 'arms' length' transactions." S. Rep. No. 225, 98th Cong. 2d Sess. 200-201 (1984). The 98th Congress wished to thwart the fraudulent transfer of money by the defendant as a means of defeating forfeiture. Obviously, the payment of utility bills, medical bills, and the like are "arms' length" transactions.1/

1/ The 98th Congress apparently had misgivings about imputing such a broad scope to the relation back doctrine. The Senate

The lack of statutory language clarifying the limited purpose of the relation back doctrine in criminal proceedings, however, brings all post-offense transactions within the literal terms of the forfeiture statute. Because the scope of the actual forfeiture cannot be known until the jury has returned a special verdict, the relation back doctrine casts a pall over the legitimacy of every transaction consummated by the defendant since the "act giving rise to forfeiture." Once criminal forfeiture charges are brought, the defendant, now a financial leper in his community, has conceivably already put even his grocer in risk of forfeiture.

Although it is true that the Comprehensive Forfeiture Act was not motivated by sympathy for the economic problems of the defendant, the relation back doctrine's primary target is third party transferees, not the defendant. United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985). These third party property owners, not named in the criminal proceedings and precluded from intervening therein, see 18 U.S.C. §1963(j); 21 U.S.C. §853(k), stand to lose the valuable consideration, in the form of goods or services, they have transferred to the defendant since he committed the alleged offense. Many, if not all, of these third parties will have parted with valuable consideration in an arms length transaction with the defendant. Congress obviously did not intend to force every transferee of the defendant to assume the burdens of petitioning a court for post-trial relief from the forfeiture verdict. See note 1, supra. This legislative intent should be made clear through the enactment of statutory langauge clarifying the appropriate scope of the relation back doctrine.

The NACDL recommends that the relation back doctrine be limited in a criminal forfeiture case by express statutory language to transactions intended by the defendant to operate as a fraud or sham transfer for purposes such as defeating the government's forfeiture claim. Once the universe of transfers by the defendant has been appropriately limited to this subset of collusive transfers, the post-trial relief process will provide this discrete group of affected third parties the opportunity to demonstrate their own subjective bona fides.

Therefore, the NACDL respectfully requests that Congress enact a definition limiting the application of the relation back doctrine to fraudulent or sham transfers of assets aimed at defeating a potential criminal forfeiture.

II. The Need for an Ordinary and Necessary Expense Exception.

Under current law, once an indictment has been returned, and even earlier in some circumstances, the government is authorized to seek a pretrial restraining order barring the defendant from using or transferring allegedly forfeitable assets. The NACDL recognizes that this statutory authority serves important government interests in preserving the ability of the government to impose forfeiture. The NACDL's objections apply not to the theory of pretrial restraints but rather to the practice of the

---

(footnote continued from previous page)
Report stated: "Where is it clear that a forfeitable asset has been sold for value to an innocent purchaser, the Committee expects that the government would seek forfeiture of substitute assets of the defendant, as provided in [the unenacted] section 1963(d) at the conclusion of trial and avoid the necessity of the purchaser petitioning for a post-trial hearing." S. Rep. No. 225, at 201 n.29. Although the 98th Congress ultimately rejected a "substitute assets" form of forfeiture in favor of an alternative fine of up to twice the defendant's criminal proceeds, see H.R. Rep. No. 1159, 98th Cong. 2d Sess. 418-19 (1984) (Conference Report), it is apparent that the 98th Congress did not intend to entangle all bona fide pre-conviction transfers of the defendant in the merits of the defendant's criminal trial.

government in seeking such restraints. Remedial legislation is appropriate to curb particularly offensive uses of pretrial restraints.

At a minimum, the government should not be allowed to deprive the defendant of all necessary living expenses during a criminal proceeding solely on the basis of the allegations in an indictment. Second, statutory pretrial restraining order provisions should explicitly permit the defendant to use income from restrained assets to defray the ordinary and necessary expenses of their management during the criminal proceedings.

Under current law, the prosecution has the discretion to seek or forego pretrial restraints on the defendant's assets. Once the government applies for pretrial restraints, however, the government is entitled to obtain reasonable restraints based on a proper showing. In litigation around the country, the Justice Department has contended that the district court has no authority to refuse or modify an application for pretrial restraints once an indictment has been returned. Although the NACDL disagrees with this narrow view of the authority of a district court to issue pretrial restraints, see, e.g. S. Rep. No. 225, at 202 (court may impose "reasonable" limits on bounds of restraining order), we only ask Congress to make explicit that courts have the authority to modify pretrial restraining orders so that a defendant will not be deprived of the necessary means of subsistence pending the outcome of trial.

In at least one prosecution under the new forfeiture law the prosecution has successfully urged the court to deny the defendant the use of his assets in order to pay the minimal living expense of himself, his wife, and two children before trial. See United States v. Thier, Crim. No. 84-60055-23, slip. op. at 6 (W.D. Louisiana Oct. 29, 1985) ("no exception carved out in the appropriate statute for the use of one's assets to . . . provide living expenses).

We consider this an offensive practice. Based on the unproven allegations of an indictment, the government asserts that it can deprive the defendant of his minimal needs for survival until the government's allegations are tested at trial. We hardly think that Congress intended to create this kind of a financial rack to wring submission from the accused.

Similarly, we urge that Congress create an express provision permitting the defendant to use income derived from his restrained assets to defray the ordinary and necessary expenses of their maintenance. Such a provision currently exists for the government in 18 U.S.C. §1963(f) and 21 U.S.C. §853(g) once the property has been declared forfeit. Under the government's broad view of its statutory restraint authority, however, the defendant is deprived of the ability to safeguard his property before a verdict is reached. If the defendant is eventually acquitted, he will have nonetheless suffered dire economic consequences from his intervening inability to use earned income to protect the value of his assets. Even if the government prevails at trial and the property is ordered forfeit, the value of the property will be diminished because of the inability of the defendant to take reasonable steps to preserve its value. The NACDL recommends that the defendant be afforded the right by statute to use income from restrained property to offset their ordinary and necessary maintenance expenses during the pendency of the criminal proceedings.

III. The Statutory Inconsistency Regarding the Use of State Law.

The statutory language defining property subject to criminal forfeiture states that the defendant "shall forfeit to the United States, irrespective of any provision of State law" the generally described property interests. See 18 U.S.C. §1963(a); 21 U.S.C. §853(a). This statutory language disclaiming the effectiveness of state law is simply inconsistent with the statutory framework for implementing a criminal forfeiture and introduces an unnecessary ambiguity into the definition of forfeitable property.

The origins of the phrase "irrespective of any provision of State law" is not clear from the legislative history of the Comprehensive Forfeiture Act of 1984. Nonetheless, it is safe to speculate that this language, dating back to the original Administration bills submitted by Senator Thurmond in 1982, was meant to codify the Justice Department's early view that third parties aggrieved by a criminal forfeiture could not seek judicial review of their state property claims in the federal criminal forfeiture proceedings. See, e.g., United States v. L'Hoste, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 873 (1980).

In 1983, however, the Justice Department changed its position and advocated that aggrieved third party property owners should have the right to petition the federal district court presiding over the criminal proceedings for relief from an erroneous forfeiture order. See The Comprehensive Drug Penalty Act of 1983: Hearing on H.R. 3299 Before the Subcommittee on Crime of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 16-17 (1983) (statement of James Knapp, Deputy Assistant Attorney General, Criminal Division). The Senate Judiciary Committee concurred in the Department's changed assessment of the need for judicial review over the third party property claims. S. Rep. No. 225, at 207-08. As a result, new procedures were created to afford aggrieved third parties the opportunity to petition the court after the completion of the criminal trial to demonstrate their eligibility for relief from the forfeiture order. Id.

By the very terms of the eligibility criteria, see 18 U.S.C. §1963(m)(6); 21 U.S.C. §853(n)(6), a third party property owner must establish that he or she has some proprietary interest in the forfeit property to establish standing to petition for relief from the judgment. The legislative history of these provisions reveals that the 98th Congress intended to restrict eligibility for forfeiture relief to those asserting a legal, rather than an equitable, ground for relief. S. Rep. No. 225, at 208.

As a general matter, courts cannot grant relief to third parties who do not, in fact, have a title claim to the forfeit asset. Property law, however, is a creature of state common law, not federal law. Mitchell v. W.T. Grant Co., 416 U.S. 600, 605 (1974). In order to prove a legitimate claim to relief, therefore, third party petitioners will have to establish their title claim by resort to applicable state property law.

In this context, therefore, the statutory admonition to disregard state property law is incongruous. Even as to the defendant, a federal court can only order the defendant to forfeit what the defendant owns. What the defendant owns is, in turn, defined by the state property laws which identify and enforce his property rights. One cannot lose what one does not own. Disregarding state law, therefore, is inconsistent with the inquiry that the forfeiture laws instruct a court and a jury to undertake in a criminal forfeiture proceeding. More important, the presence of such an admonition can only confuse courts as they attempt to implement the substantive definitions for forfeitable property.

The remedy for this statutory inconsistency is simply to delete the statutory admonition to ignore state property law. Thus, courts would determine what a defendant or third party owns for purposes of the forfeiture laws by reference to the applicable law defining their respective property interests.

IV. The Forfeiture of Untainted, Legitimate Assets.

When Congress passed the Comprehensive Forfeiture Act in 1984, the Senate's proposed language authorizing a "substitute assets" form of forfeiture was eliminated from the final bill. As stated by the House Judiciary Committee Report:

> At the present time the proposed 'substitute asset' provision appears to be ill-advised, unworkable, and the

> need for it has not been substantiated. Any attempt to forfeit 'substitute assets' which has no 'nexus' to the crime 'in personam' forfeiture is a giant step in the direction of 'forfeiture of estate' and would needlessly jeopardize successful prosecutions under this bill for years to come.

H.R. Rep. No. 845, Part 1, 98th Cong., 2d. Sess. 12 (1984). Despite this expression of Congressional intent, however, some courts have begun to permit the forfeiture of a defendant's legitimate assets in lieu of unavailable forfeit assets.

The forfeiture of substitute assets--property of the defendant having no relationship to criminal activity--is inconsistent with the purgative purposes of criminal forfeiture. The Congressional decision to strike 'substitute asset' forfeiture from the final bill is not only supportable on constitutional grounds but also for pragmatic reasons as well.

When the Conference Committee deleted the "substitute asset' language of the Senate bill, an alternative provision was enacted in its place. See H.R. Rep. No. 1159, 98th Cong., 2d Sess. 418-19 (1984) (Conference Report). This legislative substitute at the Conference Committee level was titled an "alternative fine." This alternative fine, in any amount up to twice the sum of the defendant's criminal proceeds, is a substantial additional penalty beyond the forfeiture of tainted assets. In many respects, and in aggregate financial impact, the alternative fine may impose a heavier economic sanction for criminal activity than that accomplished by the eliminated substitute asset forfeiture provision. Nonetheless, even after this legislative compromise was enacted into law, the Justice Department has renewed its effort to obtain enactment of a substitute asset form of criminal forfeiture. See Statement of Ass't Attorney General Keeney before House Subcommittee on Criminal Justice, at 63-65 (September 18, 1985) (arguing for substitute assets forfeiture).

We note also that the Senate Judiciary Committee has before it a bill, S. 1654, containing a substitute assets provision in the limited context of espionage forfeiture. If S. 1654 is reported favorably, the NACDL would strongly urge deletion of this provision, set forth in the proposed new section 794(d)(2) of title 18, in order to be consistent with the provisions of the Comprehensive Forfeiture Act.

Despite the clear Congressional rejection of substitute assets as a form of forfeiture, some courts have indicated favor for this practice. In United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985) (en banc), the Seventh Circuit held that the government could execute upon its forfeiture judgment by forfeiting untainted assets of the defendant. The Eleventh Circuit has reached a similar conclusion. United States v. Navarro-Ordas, 770 F.2d 959 (11th Cir. 1985). Neither opinion mentions the Congressional debate over substitute assets nor do they address the constitutional concerns identified by the House Report.

Wholly apart from the constitutional questions associated with the forfeiture of legitimately owned assets, the balance struck by Congress in favor of an alternative fine completely negates the need for substitute asset forfeiture. Moreover, the recent trend in the courts will undermine the procedures carefully crafted by Congress for resolving title to forfeit assets.

For example, current law provides for post-trial hearings at which third parties aggrieved by a forfeiture order can seek relief from the court. After this post-trial process is complete, the government is statutorily authorized to warrant good title to subsequent purchasers. 18 U.S.C. §1963(m)(7); 21 U.S.C. §853(n)(7). As one court has described it, this process is the means by which the government perfects its claim to good title. United States v. Peters, 777 F.2d 1295, 1297 (7th Cir. 1985). If, on the other hand, the government can go beyond the adjudicated properties listed in a forfeiture judgment, this

title-perfecting process is completely circumvented. Unlike property which has been adjudicated forfeit in the criminal proceedings, the government's title to "substitute" property does not have the benefit of this title-perfecting process.

Congress was undoubtedly correct in 1984 when, at the urging of the Justice Department, it created new post-trial hearings allowing third parties to seek judicial review of their property deprivations in criminal forfeiture trials. The need for such judicial review was made even more compelling by the adoption of the relation back doctrine specifically directed at reaching property in the hands of third parties. Allowing the government to re-open the scope of the defendant's forfeiture after the judgment becomes final by permitting seizure of his untainted assets will create a new class of aggrieved property owners. More important, this new group of aggrieved property owners--aggrieved not by the forfeiture judgment but by government efforts to forfeit substitute assets in lieu of those listed in the judgment--will not be in a position to obtain relief by petitioning for judicial review of the forfeiture order. Not only will these property owners be deprived of judicial review over their property deprivations, the government will also be unable to pass marketable good title to subsequent purchasers. The merits of a substitute assets provision aside, both of these consequences defeat the plain intent of Congress in enacting these new post-trial procedures.

In conclusion, the NACDL recommends that remedial language be enacted to clarify that only property that has been adjudicated to be subject to forfeiture in the criminal proceedings is amenable to forfeiture by the government.

CONCLUSION

The NACDL fully supports the legislative goal of taking the profit out of crime. The enhanced forfeiture powers available to the government under the CFA, however, must advance that agenda within the fundamental traditions of our adversarial system of justice. Accordingly, the NACDL recommends that the criminal forfeiture laws be amended to improve their effectiveness while preserving the basic fairness of our system of criminal justice.

64-197 O - 86 - 8

Responses to Senator Biden's Questions From Neal R. Sonnett

1. In your prepared statement, you express concern about the government's use of subpoenas to defense counsel. Wouldn't most of the problems posed by subpoenas to defense counsel exist no matter what changes were made in the forfeiture statute?

It is difficult to say what proportion of subpoenas to defense counsel relate to attorney fee forfeiture counts. If such information exists--that is, breaking down the total number of subpoenas issued to defense lawyers according to the precise issue involved--it would be under the control of the Justice Department. NACDL unfortunately does not have access to it.

Without trying to pin down any such proportion, it can certainly be said that the problems surrounding subpoenas to defense counsel are by no means limited to fee forfeiture counts. The information sought, however, does most commonly relate to fee payments--for example, to pursue forfeiture of fees, or to show the accused's substantial assets or substantial income for tax or CCE purposes, or to show that one person supervised or controlled another, as reflected in the paying of their attorneys' fees, for purposes of RICO or CCE counts.

Our purpose in presenting the subpoena issue is not to suggest that it is coextensive with the fee forfeiture issue, but to stress that the two issues are closely related, often ovelapping, and implicate similar Sixth Amendment issues, ethical considerations and the same disturbing shift in the Justice Department's perception of the sanctity of the attorney-client relationship.

Thus, we would agree with your inference that there is no strict necessity for the Congress to consider or dispose of the two issues together. What we do wish to convey is that neither should be considered in isolation. The issue is not simply the lawyer's right to be paid for services rendered, or not to be asked questions about fees. Rather, the Congress should not lose sight of the umbrella issue of the right to counsel and the health of the adversarial balance between the accuser and the accused. Practices such as fee forfeiture, subpoenas to defense counsel, law office searches and informants in the defense camp, while perhaps intended simply to make law enforcement more "effective", have the inevitable effect of removing the possibility of privately retained counsel from the defense side of the adversarial equation, or of chilling clients' desire to share information with their attorneys, thus impairing the client's ability to receive the effective assistance of counsel. It is the pattern which is important, more than each individual practice.

2. Doesn't the subpoena problem stem primarily from a change in attitude by the Justice Department, rather than from a statutory change?

As I have suggested, the Justice Department's change in attitude is a very significant factor. But we would suggest that the change in attitude may derive from, or at least be aggravated by, the change in law.

The relation-back doctrine relied upon in the 1984 forfeiture provisions appears on its face to be quite all-inclusive, applying to all third party transferees other than wholly unknowing purchasers for value. Although there is obviously much room for doubt under both the Constitution and the legislative history that the statute should apply to attorneys' fees, the Justice Department has concluded that it does, and has thus opened the door to this new breed of attorney subpoenas. Indeed, the study of prosecutorial practices appended to my testimony (attachment no. 1, at 13) confirms that roughly contemporaneously with the enactment of the 1984 legislation, there was a more than three-fold increase in the number of grand jury subpoenas issued to defense lawyers

3. How would you respond to the cases (cited in the Justice Department Guidelines at section 9-111.620) that have upheld the government's questioning of defense counsel about their fees?

The Department cites these cases for the proposition that: "Generally, courts have held that fee information is not privileged." Of this there is no doubt, the reasoning being that such information generally reveals nothing of the substance of the matter for which counsel is sought. What is omitted, however, is the equally well established exception to this general rule--that the privilege does apply to fee information where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought, or would yield substantially probative links in an existing chain of inculpatory events or transactions.

Even the cases cited by the Department embrace this exception. In re Special Grand Jury (Harvey). 676 F.2d 1005 (4th Cir.) vacated and withdrawn, 697 F.2d 1[illegible] (1982) (en banc); In re Grand Jury Investigation, 631 F.2d 17 (3d Cir. 1980), cert. denied, 449 U.S. 1083 (1981); In re Grand Jury Proceedings (United States v. Jones), 517 F. 2d 666 (5th Cir. 1975).

It should also be pointed out that none of these cases address the combined issues of subpoenas to defense lawyers and disqualification. As I indicated in my testimony, the Code of Professional Responsibility, under DR5-102(B), may require the disqualification of counsel who is compelled to present testimony in a case involving a present client, when it becomes "apparent that his testimony is or may be prejudicial to his client." The resulting "prosecutor's veto" presents serious additional Sixth Amendment problems--deriving from the prosecutor's ability, simply by pursuing a subpoena for certain information, to bring about the removal of the accused's counsel of choice.

4. Several courts have rejected forfeiture of attorneys fees on the ground that the defendant would be deprived not only of its chosen counsel, but of any counsel. Couldn't this problem be removed by altering eligibility standards for public defender assistance?

It is difficult to imagine how any such alteration would be workable. It is worth bearing in mind that the cases where fee forfeiture is a potential issue--that is, RICO and CCE cases--generally entail substantial legal representation requirements long before an indictment is issued, perhaps long before the

client is even considered a target of a grand jury investigation, and thus long before there has appeared on the horizon any legal cloud over the individual's assets. Often, the investigation and grand jury phase of such cases can drag on for years. It would be very difficult to craft an eligibility standard which could perceive with adequate clarity and respect for due process the existence of such a cloud hovering in the distance.

Even if the eligibility alteration were limited to the post-indictment phase, there would be serious constitutional problems. Assume, for example, that a restraining order is entered after the return of a RICO indictment, forcing the defendant to turn to a Federal defender, and to forsake the privately retained counsel who has represented him through two years of investigation and gained an intimate familiarity with the case. The first problem is the difficulty of transition between attorneys in the brief time (mandated by the Speedy Trial Act) between indictment and trial. As Judge Kane noted in the Rogers case: "Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. It is not consistent with due process to create a situation which eliminates the adversary from the adversary process." 602 F.Supp at 1350.

Secondly, and very troublingly, suppose the defendant suffers actual prejudice as a result of being forced to relinquish retained counsel--for example, by being convicted of a more serious crime than he actually committed, or of a crime that he did not commit at all--and that appropriate vindication might have been had in the hands of an experienced RICO practitioner, rather than a Federal public defender inevitably unversed in such complex cases. I would suggest that restraining the use of money destined for attorneys' fees is qualitatively different from restraining the defendant's assets in general. In the latter circumstance, there is no way after a conviction to make the defendant whole again: simply giving the money back cannot restore the quality of legal representation services that the money would have bought, nor remove the harm, whether deprivation of liberty or injury to reputation, that has resulted.

5. If the problem is one of public defender resources, rather than eligibility for public defender assistance, couldn't that problem be addressed by diverting a portion of the forfeiture fund to increase public defender staffing?

It is not simply a question of resources. It also involves the limitations of the Speedy Trial Act and the Jencks Act. As I suggested in the answer to the previous question, the very short preparation time afforded a Federal public defender, compared to the total and sustained immersion of the U.S. Attorney and the investigative team, exacerbated by the Jencks Act limitations on discovery, would create an impermissable imbalance in the adversarial equation (see testimony of Edward Marek, on behalf of the Federal Public Defenders, at the May 13 hearing), in violation of the defendant's due process rights.

Moreover, as a policy matter, such a proposal would be fundamentally at odds with the prevailing vogue in Congress, and particularly in the Administration, in favor of privatization. What justification is there for seizing money from an individual and processing it through the Federal treasury back to the individual, rather than simply exempting it from seizure in the first place? And even though the proposal would directly require

no new appropriations, the attitude prevailing under the Gramm-Rudman deficit reduction plan is likely to ensure that any such reprogramming of existing Federal money away from its intended use will encounter the closest scrutiny, and, particularly if there is a chance that such diversion of funds will require a "backfilling" appropriation to the forfeiture fund, will fail.

Finally, increasing the amount of funds available for Federal public defenders to handle certain complex cases is not likely to result in any in any correlative increase in staffing. The public defender offices will have to handle such cases with existing personnel, draining the limited pool of man-hours available for the office's primary mission--providing services to the truly indigent in a host of far less complicated and time-consuming cases. Even if the funding increase is applied across the board to all Federal defender offices in the country, so as to result in actual staffing increases everywhere, there is the problem of spreading the money too thin, beyond the handful of offices most likely to be burdened with such cases.

6. One legislative proposal currently being discussed would allow payment of attorneys fees out of otherwise forfeitable assets at the compensation rates fixed in the Criminal Justice Act. Is this a viable solution to the fee forfeiture problem? Is there any reason why defendants in RICO and CCE cases should be entitled to pay their counsel more than the rates for appointed counsel?

A private attorney who attempts to devote a 40-hour week at CJA rates (maximum of $60 per hour, for in-court work) to the defense of a RICO or CCE case, requiring certain minimal competent staff support, simply will not be able to meet the office payroll. Assistant Attorney General Steve Trott has expressly acknowledged this fact, in discussions at the Justice Department on April 29 with NACDL Past President Albert Krieger. Indeed, in the so-called "Pizza Connection" case (United States v. Badalamenti, 614 S.Supp. 194 (S.D.N.Y. 1985)), the Government assumed the obligation to pay defense counsel at CJA rates, and even though the total cost to the Government for defense representation amounted to over $1.2 million, the lawyer could not cover his expenses, and his practice was destroyed. He no longer accepts such cases.

It is also necessary to consider the long-term effect of Congress adopting a policy of placing a cap on the hourly rate that a criminal defendant can pay for defense representation. If it is the Congress's desire to put an end to the privately retained criminal defense bar, and the benefits to society that flow from it, then this is the way to do it. If it is the Congress's desire to put an end to the voluntary teaching by criminal defense lawyers that is the backbone of Continuing Legal Education in criminal law in this country (NACDL, for example, with volunteer help from dozens of its most experienced members, sponsors CLE seminars four times every year), then this is the way to do it. And if it is the Congress's desire to eviscerate the institution of pro bono representation in significant cases of public interest (such as the six months devoted by my colleague Mr. Krieger to the defense of the Wounded Knee case), then this is the way to do it. These are vital public services. They are an unwavering tradition in the private criminal defense bar. But they simply cannot be sustained if lawyers must risk bankruptcy to take a day or two off from paid representation.

7. Could you support a scheme in which the courts would be empowered to award counsel's fees from otherwise forfeitable assets, and be given discretion to fix the amount of fees on a case-by-case basis?

We cannot support any proposal to require courts to set attorneys' fees in criminal cases. There are serious ethical problems involved. For example, it would violate the Code of Professional Responsibility's prohibition against contingent fees in criminal cases (DR 2-106(C)): whatever portion of the fee rose above the fee ultimately set by the court could be kept by the lawyer only if the defendant were acquitted. There would also be a conflict of interest between the lawyer's obligation to negotiate a guilty plea which is in the client's best interest, and the lawyer's desire to tailor a plea that does not endanger his or her fee.

There are practical problems as well. A court undertaking, on an ad hoc basis, to set an appropriate fee in a particular case, would have to conduct a very complex inquiry, including examining the level of experience and expertise of the lawyer, the quality and amount of work involved, the complexity of the case, prevailing fees in the community, and so on--that is, much the same kind of complex lodestone/multiplier inquiry that the Federal courts must currently conduct in setting a "reasonable" fee under section 1988 of title 42 in civil rights cases. It is the kind of time-consuming inquiry which, as the members of the Judiciary Committee well know, the Federal courts loathe and are eager to have changed, and would therefore be vehemently opposed to extending to new areas of law.

Finally, and most importantly, the courts simply have no business interfering in a fee arrangement freely entered into between attorney and client--unless, of course, the fee runs afoul of the Code of Professional Responsibility's prohibition against fees which are "clearly excessive" (DR 2-106). There is no precedent whatsoever, in either criminal or civil law, for such a proposal. Even section 1988, referred to above, is not apposite: it governs the payment of fees to a prevailing party by the opposing party, and does not presume to interfere between the attorney and his or her own client. Nor are the varying percentage caps on contingent fees in civil actions for damages instructive: they do not limit the amount of the fee--only its ratio to the damages awarded.

8. Aren't there any circumstances beside the "sham or fraud" situation in which forfeiture of attorneys fees from crime proceeds is appropriate? For instance, where a court has determined that all of a defendant's assets are in fact proceeds of a crime, should an attorney be able to keep half those asets as a fee, especially if it amounts to hundreds of thousands of dollars? There is no incentive for defendants, faced with a threat of forfeiting all assets, to bargain for a low counsel's fee, is there?

Yes, there are circumstances beyond the "sham or fraud" situation where fee forfeiture may be justified. We share the ABA's view that forfeiture would be appropriate also where the attorney has engaged in criminal conduct to the extent, for example, of becoming a participant or co-conspirator in the client's RICO or CCE offenses.

We disagree, however, that a client charged with a RICO or CCE offense has "no incentive to bargain for a low counsel's fee." In my extensive experience, clients are always interested in paying not a penny more than they must. They do not come into my office assuming that they will be convicted, and assuming that all their money will be forfeited. Until a forfeiture order is actually executed, they treat the money very much as their own.

As for the possibility that defendants, to play it safe, might just transfer all their assets to their attorneys under the guise of attorneys' fees, above and beyond any reasonable value of the legal services performed, the "fraud or sham" exception is designed to target just such an instance: this would be precisely the type of sham transaction that this Judiciary Committee condemned in citing United States v. Long, 654 F.2d 911 (3d Cir. 1981), in its report on the 1984 forfeiture provisions. Such a transfer would also leave the attorney subject to disciplinary proceedings for accepting a "clearly excessive" fee.

Additional Questions For Neal R. Sonnett

1. YOU STATE IN YOUR REMARKS THAT THE FORFEITURE OF ATTORNEYS' FEES DOES NOT STRIP RACKETEERS AND DRUG DEALERS OF "ECONOMIC POWER BASES" GENERATED BY THEIR CRIMINAL ACTIVITIES. BY THIS STATEMENT, DO YOU SUGGEST THAT THERE IS NOT A DIRECT RELATIONSHIP BETWEEN PROFITS DERIVED FROM ILLICIT TRAFFICKING IN DRUGS AND THE ESTABLISHMENT AND CONTINUATION OF PROFITABLE BUSINESSES BY DRUG DEALERS?

Not at all. It is self-evident that drug profits can fuel a wide range of business enterprises by drug traffickers. Indeed, NACDL recognizes the importance of cutting off that supply of fuel, by stripping racketeers and drug dealers of the "economic power bases" with which they fund their criminal enterprises.

What we are suggesting is simply that assets used to pay bona fide attorneys' fees cannot be considered a part of that economic power base. Money paid to an attorney for criminal defense representation adds nothing to a defendant's economic power base. The attorney receives the money and converts it into constitutionally protected legal services. Assume that bona fide attorneys' fees were not forfeitable: if the defendant is convicted and ordered to forfeit all he owns, because it all represents ill-gotten gains, then he goes to prison an absolute pauper. The money he was allowed to set aside for attorneys' fees is gone--converted into a constitutional right. Is he enriched by it? Perhaps, in the same way that we are all enriched by the protections of the Bill of Rights. But it is certainly not the kind of enrichment which he can re-convert, upon his release from prison, into any kind of "economic power" with which to fuel some new criminal enterprise. He is bankrupt. The congressional purpose is met.

Suppose the defendant is not convicted. Some appear to feel that this would be because the defendant managed to cheat justice by hiding behind a fancy defense lawyer. But obviously, if the defendant is acquitted, it is not the "fault" of the defendant, his money, or the lawyer--it is the jury which does the acquitting, and it is the jury's constitutional duty to do so whenever it finds that the defendant's guilt has not been proven beyond a reasonable doubt. And if the jury finds him not guilty, then he is not guilty, and nobody has been cheated. Rather, justice has been done. And if the Government feels that justice has not been done, then its proper recourse is to appeal--not to assert the right to remove the adversary from the adversarial process.

The Justice Department's testimony expresses great concern about situations where a defendant has both legitimate and illegitimate assets, fearing that "if attorneys' fees are exempt from forfeiture, a defendant would have every incentive to pay his attorney with the illicit assets and retain only his legitimate assets," thus realizing "the full economic benefit of his misconduct by bartering the ill-gotten proceeds for legal services." Testimony of Stephen Trott, May 13, 1986, at 6-7.

But the Government can easily address this potentiality within existing law, without stumbling into the constitutional quagmire of forfeiture of attorneys' fees. There is existing authority, in both RICO and CCE cases, to pursue criminal fines in an amount up to twice the proceeds of the criminal activity. See 18 U.S.C. 1963(a); 21 U.S.C. 853(a). The Department could issue guidelines establishing a firm policy of pursuing such fines, in the full double amount, in any case where the defendant had attempted to avoid forfeiture by paying the attorney with illegitimate assets while keeping the legitimate assets safe for himself. Such a policy would not only remove the incentive for such a maneuver by a defendant; it would affirmatively create a disincentive, by ensuring that the maneuver would end up costing the defendant twice as much as paying the lawyer with legitimate assets.

Thus, the Department has it within its power today to moot this concern entirely, by creating and enforcing such a powerful incentive for defendants to pay their attorneys only with legitimate assets. That the Department has not seized this opportunity might suggest, to cynics, that its interest is not so much in stripping defendants of their economic power base, but in denying them their counsel of choice.

2. WHAT IS THE DIFFERENCE BETWEEN THE GOVERNMENT ATTEMPTING TO FORFEIT AN AUTOMOBILE OR YACHT PURCHASED WITH ILLICIT NARCOTICS OR RACKETEERING PROCEEDS AND THE GOVERNMENT ATTEMPTING TO FORFEIT ILLICIT PROCEEDS USED TO RETAIN A DEFENSE ATTORNEY?

Your question actually implicates two differences. First, forfeiture of an automobile or a yacht is commonly accomplished through civil proceedings--that is, in rem proceedings against the property itself, on the basis that it is the property, rather than the person, which is guilty. Civil forfeiture, of course, is easier to accomplish than criminal forfeiture, in the sense that there is a lesser burden of proof to be met. In addition, civil forfeiture can be pursued regardless of whether there has been a criminal conviction. Moreover, the property need not represent the actual proceeds of a crime; it may suffice that the property was used--or even simply intended to be used--in the commission of a crime.

But more significantly, there are some very fundamental legal differences between a car or a yacht, and the retention of the services of a defense attorney. Obviously, there is no constitutional right to a car or a yacht. Moreover, when a defendant's car or yacht is taken from him before trial, it can quite feasibly be returned to him in perfect condition after trial, in the event that he is acquitted or the particular property in question is found not to be forfeitable. But the services of defendant's counsel of choice, if taken from him during trial, can never be restored to him. He can never be made whole. The trial is over, and he was compelled to weather it with a different attorney--one he would not otherwise have chosen, and one who, no matter how competent, will have had to rush to "catch up" with the complex groundwork which was undertaken by chosen counsel and which is inherent in the preparation of RICO and CCE cases. The risk of actual prejudice to the defendant in the outcome of the trial, as a direct result of the switch in attorneys, is palpable--but unfortunately, so difficult to identify and quantify as to guarantee that relief, by way of appeal or habeas corpus, will be foreclosed.

3. IN YOUR WRITTEN REMARKS, YOU STATE THAT DEFENSE ATTORNEYS HAVE CHANGED THE WAY THEY PRACTICE LAW IN RESPONSE TO THE GOVERNMENT'S FEE FORFEITURE EFFORTS. IN WHAT WAYS HAVE DEFENSE ATTORNEYS ALTERED THE WAY THEY DEFEND NARCOTICS AND RACKETEERING DEFENDANTS?

Reported changes in the way defense attorneys practice include: declining to take cases potentially involving forfeiture or an investigation that would affect their legal practice; taking fewer criminal cases; refusing to take any criminal cases at all; becoming less open and more guarded in providing advice to clients out of a fear that their advice might be misinterpreted and used against them by the client, later cooperating with the government; keeping far more detailed records; and requiring clients to sign forms stating that the money used to pay the attorney's fee was not associated with or tainted by criminal activity. For more detailed information on these issues, I would refer you to the article entitled "Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense," The Champion, May 1986, which is appended as Attachment no. 1 to my May 13 testimony before the Judiciary Committee. Specifically, see page 12 of that article, the sections entitled "the Effects of the Prosecutorial Practices," and "Reported Beliefs and Experiences," et seq., and accompanying Figures.

The CHAIRMAN. Now, we have two witnesses left, Edward F. Marek, Federal public defender, Northern District of Ohio; and Prof. Kathleen F. Brickey, Washington University School of Law. Would you come around?

Senator Grassley is going to conduct the remainder of this hearing. He will allow each one of you 5 minutes to give the thrust of your position. Your entire statements will go in the record. We thank you very much for your appearance here today.

Senator Grassley, will you take the hearing?

Senator GRASSLEY. Yes, I will be glad to.

The CHAIRMAN. Thank you.

Senator GRASSLEY [presiding]. Proceed, please, as introduced.

STATEMENT OF A PANEL CONSISTING OF EDWARD F. MAREK, FEDERAL PUBLIC DEFENDER, NORTHERN DISTRICT OF OHIO, CLEVELAND, OH, ON BEHALF OF THE FEDERAL DEFENDER LEGISLATIVE SUBCOMMITTEE; AND KATHLEEN F. BRICKEY, PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL OF LAW, ST. LOUIS, MO

Mr. MAREK. Thank you, Mr Chairman. I have a complete statement that I would like to submit for the record. I am appearing on behalf of the 41 Federal public and community defenders who conduct trials in the Federal courts.

The main aspect of the question before the committee that I want to address, Mr. Chairman, is the Department of Justice's argument that the availability of appointed counsel is the solution to the sixth amendment problems that are created by forfeiture of attorneys' fees.

For a variety of reasons, as set forth in detail in our statement, we do not believe that the system for delivering appointed counsel in this country will solve the problem.

First, there will be a large number of defendants who will not qualify for assigned counsel because, where a restraining order is not in place, assets are unencumbered.

Several district court judges already have stated in dicta that a defendant in this situation would not be financially eligible for assigned counsel.

Second, and perhaps more importantly, even where an indictment with a forfeiture clause is itself sufficient for financial eligibility, the problem of qualifying for assigned counsel without giving up fifth amendment self-incrimination rights exists. As we explain in detail in our statement filed with the committee, a defendant's assets cannot be used to hire counsel because they are subject to forfeitures.

They are potentially derived from criminal activity or they have afforded the defendant a source of influence over some business now alleged to be a RICO enterprise.

What you have in this scenario is a defendant standing before a judicial officer requesting assigned counsel where the source and/or use of his assets is a paramount issue.

The magistrate will inquire as to the reason these assets cannot be used to hire an attorney. This discussion will inevitably give rise to information relevant to the underlying RICO or drug conspiracy

prosecution, that is, the source or use of the defendant's assets. In order to answer these questions the defendant is being forced to incriminate himself.

The defendant may be unwilling to engage in this type of discussion and stand mute. Therefore, he runs the risk of being found ineligible for assigned counsel. Incredibly, the decision of a magistrate finding a person ineligible for assigned counsel is not subject to immediate appellate review.

Therefore, you have the prospect of tbe defendant standing trial without a lawyer.

Moreover, the system of appointed counsel cannot afford a defendant an attorney prior to indictment. The Supreme Court only last March held that the sixth amendment does not provide for assigned counsel prior to the initiation of formal judicial proceedings; that is, the indictment.

Therefore, during the critical grand jury investigation stage, when retained counsel has the opportunity for 1 year or 1½ years to prepare a defense, the defendant who cannot hire a lawyer because his assets are subject to forfeiture, is without counsel. Neither the Criminal Justice Act nor the sixth amendment, under current interpretation, can deliver assigned counsel in this situation.

Finally, the realities of RICO prosecutions are that they require an enormous amount of resources. The Criminal Justice Act is simply not equipped under present funding to afford sufficient resources to Federal public defender offices and private attorneys assigned under the Criminal Justice Act to adequately handle these cases.

My experience with cases involving 3- to 4-month trials, in an office with only three or four lawyers, convinces me that three or four cases a year like that will decimate the resources of my office and will not permit us to provide a high standard of representation to our other clients.

Finally, Mr. Chairman, private counsel may not accept assignments under the Criminal Justice Act in these cases. The U.S. Judicial Conference last month reluctantly imposed a 10-percent cut in the fees paid attorneys in these cases.

Given the length of the cases and the financial hardship, many experienced lawyers will not take these cases; the result will be that inexperienced counsel will be assigned, with the prospect of rendering ineffective assistance of counsel in very complex cases.

Thank you.

[The prepared statement and responses to questions follow:]

STATEMENT

OF

EDWARD F. MAREK
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF OHIO

AND

FEDERAL DEFENDER LEGISLATIVE SUBCOMMITTEE

ON BEHALF OF

THE FEDERAL PUBLIC DEFENDERS

AND

FEDERAL COMMUNITY DEFENDERS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING FORFEITURE OF ATTORNEY FEES

May 13, 1986

A. Introduction

In enacting The Comprehensive Crime Control Act of 1984 Congress substantially expanded the government's powers in forfeiture actions under the RICO statute (18 U.S.C. §1963) and under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 801 et seq.) to permit forfeiture in all felony drug offenses as well as in a Continuing Criminal Enterprise (21 U.S.C. § 848, hereinafter CCE). A major feature of the forfeiture amendments restricts the ability of a RICO or drug defendant to transfer forfeitable assets before conviction. This is accomplished through use of a "relation back doctrine". This doctrine provides for vesting of title in the United States to property subject to forfeiture as of the time of commission of the act giving rise to the forfeiture. 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c).

In addition, Congress expanded the type of property subject to forfeiture from its already broad definition. All proceeds, including derivative property, of RICO or felony drug activity are subject to forfeiture, together with any property which affords the defendant a source of influence over a RICO or CCE enterprise. Forfeiture now extends far beyond the "dirty money" derived from drugs sales by person with no legitimate source of income -- an example proponents of forfeiture are fond of citing; rather, it can reach any asset, legitimately earned or not, representing an ownership interest in a legitimate business alleged to be a RICO enterprise conducted through two racketeering acts. 18 U.S.C. §1963(a)(2)(D) Where a legitimate business entity is alleged to be a RICO enterprise, for example, any property interest, real or personal, tangible or intangible, which the defendant owns in the enterprise is subject to forfeiture. This would also include any cash generated by the business, which would qualify for forfeiture as "proceeds". Thus,

where a defendant's overall net worth is substantially commingled in a business enterprise few assets not subject to forfeiture may remain.

The operation of the "relation back doctrine" and the wide variety of property subject to forfeiture have facilitated recent government efforts to forfeit funds and other assets transferred to attorneys as fees for legal services rendered in RICO and drug cases. Attorney fees are particularly vulnerable because even a bona fide transferee for value of assets subject to forfeiture cannot prevail over the government's vested title under the relation back doctrine unless he can show he was "reasonably without cause to believe that the property was subject to forfeiture." 18 U.S.C. § 1963(c)(m); 21 U.S.C. § 853(n)(6). Thus, an attorney called upon to provide representation in a RICO or drug conspiracy case at either the grand jury investigation stage or after indictment would be particularly hard pressed to demonstrate that he or she was reasonably without cause to believe that assets transferred as a fee were subject to forfeiture.

Since enactment of the these amendments, the government has taken the position, accepted by at least two district court judges[1], that assets transferred to an attorney as payment of fees for legal services can be subject to forfeiture and that the defendant's Sixth Amendment right to counsel is not impaired as a result because he is entitled to court appointed counsel. See Section 9-111-210, Title 9, United States Attorneys' Manual. This position rests directly on the availability of court appointed legal services under the Sixth Amendment and under the Criminal Justice Act (18 U.S.C. § 3006A). Accordingly, Federal Public and

---

1. In re Grand Jury Subpoena Duces Tecum (Payden) Dated January 2, 1985, 605 F.Supp. 839, 849 n. 14 (S.N.D.Y. 1985), rev'd on other grounds, 767 F. 2d 26 (2d Cir. 1985); United States v. Burnette, III, Crim. No. 85-35-NN, (E.D.Va., January 15, 1986).

Community Defenders are in a unique position to provide informed comment on whether current law, practice and available resources are sufficient to fill the Sixth Amendment vacuum created by the threat, and fact of, forfeiture of attorney fees.

Since amendment of the Criminal Justice Act in 1970, 41 Federal Public and Community Defender organizations, operating in 48 of the 94 judicial districts have been established. In fiscal year 1985 federal defenders represented 28,680 persons or 52.5% of the total recipients of CJA representation. Based upon our experience, we believe that the Department of Justice position regarding court appointed counsel is both legally unsound and in disregard of the practical and resource limitations on available and effective court appointed representation in these complex and extended investigations and cases. As we demonstrate below, a target of a grand jury investigation or an indicted defendant can be denied assigned counsel altogether, or if one is appointed, he may be denied effective representation. We also believe that the current resources and the level of funding available under the CJA make it impossible for federal defender organizations both to continue to provide a high degree of professionalism and competent representation as is now made available to all our clients and to accept assignment of any sizable number of major RICO or drug conspiracy cases (which will require appointed counsel as a result of a policy of forfeiture of attorney fees).

B. Financial Qualification For Appointed Counsel

A person is entitled to appointed counsel under the Criminal Justice Act if he demonstrates that "he is financially unable to obtain counsel". 18 U.S.C. § 3006A(b). In some cases involving forfeiture of attorney fees the government has obtained a pretrial order restraining the transfer of assets subject to forfeiture. Where this has occurred it appears that financial inability to obtain counsel can be shown since available assets

are encumbered. However, where a restraining order has not been obtained, targets of RICO or drug grand jury investigations (assuming arguendo they are entitled to appointed counsel under the Sixth Amendment at this stage) or indicted defendants with substantial assets arguably would be unable to qualify for assigned counsel since they could not lawfully execute an oath or testify that they were financially unable to hire counsel. Their assets, even though ultimately subject to forfeiture, would be unencumbered. Thus, for these individuals the denial of counsel is in reality absolute: private counsel would not undertake representation because any fee is likely to be subject to forfeiture and assigned counsel cannot be appointed, particularly at the grand jury stage, because the defendant has not been rendered "financially unable" to hire counsel.[2]

However, even if we assume arguendo that the mere existence of a RICO or drug grand jury investigation or indictment -- with the accompanying threat of forfeiture of attorney fees -- renders the target or defendant "financially unable to obtain counsel" for purposes of eligibility under the CJA, the problem of obtaining court appointed counsel still remains. To obtain assigned counsel under the current system in a cases involving forfeiture a defendant must face the prospect of paying the unacceptable price of forfeiting his Fifth Amendment

---

2. Two courts have recognized this dilemma and have stated that the defendant would be ineligible for appointed counsel. Accordingly, they found a denial of the basic right to counsel and concluded that it was unnecessary to address the issue of a denial of the qualified right to counsel of choice. United States v. Badalamenti, 614 F.Supp 194, 197 (S.D.N.Y. 1985); United States v. Ianniello, _____ F. Supp. ____ (S.D.N.Y. Sept. 3, 1985 - S85 Cr. 115 (CBM)) See also, United States v. Bassett, ____ F.Supp. ____ n. 5 (D.Md. April 11, 1986, Crim No. n-85-0541).

Moreover, an order of a trial court finding that a defendant does not financially qualify for appointed counsel is not subject to immediate appeal. Flanagan v.United States, ___ U.S. ___, 104 S.Ct. 1051 (1984); United States v. Celani, 748 F.2d 363 (7th Cir. 1984). Thus, a defendant with assets subject to forfeiture but nevertheless found ineligible for assigned counsel would be forced to trial without representation by any attorney.

right against self incrimination. In order for the defendant to demonstrate that he is "financially unable to obtain counsel" he will be called upon to show, in some fashion, that his available assets are likely to be subject to forfeiture and therefore cannot effectively be used for payment of attorney fees. One likely scenario is one in which the accused is placed in the dilemma of demonstrating to a judicial officer, with the prosecutor eagerly looking on, that his available assets are either proceeds of drug or RICO activity or that they afforded him a source of influence over a business which is now alleged to be a RICO enterprise that he conducted through two racketeering acts. At the very least, we must assume that a judicial officer asked to appoint counsel to a person with substantial assets will seek to engage the defendant in a dialogue as to the reason his assets cannot be used to hire an attorney. This interchange will inevitably lead to a discussion of the source and/or utilization of the defendant's assets. Both subjects usually are highly relevant to a RICO or drug conspiracy prosecution and the defendant's answers could easily incriminate him. On the other hand, if the defendant elects to stand mute, he risks a finding of ineligibility for assigned counsel. Incredibly, the determination of eligibility for appointed counsel is not subject to an immediate appeal.[3] The result is that the defendant will stand trial without counsel. It is readily apparent that enormous pressure is placed on the Fifth Amendment right against self incrimination. In effect, the accused in need of counsel at this critical stage is forced to forego one constitutional right to protect another.[4]

---

3. Flanagan v. United States, supra; United States v. Celani, supra.

4. This scenario can also lead to a violation of the defendant's attorney-client privilege since any judicial inquiry into the reason for an attorney's reluctance to take the case will naturally reveal the nature of the discussion between the defendant and attorney he seeks to hire. While courts have held that fee discussions are normally not covered by the attorney-

C. The Pre-Indictment Stage

In addition to the problems surrounding qualification for appointment of counsel based on a showing of financial eligibility, current Supreme Court interpretation of the Sixth Amendment right to counsel and limitations in the Criminal Justice Act and its guidelines further make the alternative of appointed counsel even more unacceptable.

As judges in several cases dealing with the issue of forfeiture of attorney fees have observed, indictments in these cases tend to be preceded by a lengthy grand jury investigation directed by the prosecutor perhaps lasting 1 to 2 years, involving multiple business entities and substantial volumes of documents and computer data.[5] The government can leisurely prepare its case during the grand jury investigation stage (constrained only by a 5 year statute of limitations), and, after indictment, rely on the Speedy Trial Act to force the case to trial within 90 to 120 days under the argument only belatedly made that "justice delayed is justice denied".

By contrast, the grand jury targets in these cases with assets likely subject to forfeiture, are unable to hire attorneys because of the threat of forfeiture of fees. Most significantly, the targets are not entitled to court appointed counsel under Supreme Court decisions holding that the Sixth Amendment does not provide a right to appointed counsel prior to the initiation of formal adversary proceedings i.e., an indictment. Moran v. Burbine, _____ U.S. ____ (_____),38 CrL 3182 (March 10, 1986)(No. 84-1485); United States v. Gouveia, 467 U.S. 180 (1984). Thus, at

---

(CONTINUED FROM PREVIOUS PAGE)
client privilege, the source of a potential fee is relevant both to the merits of a RICO or CCE offense and to the need for legal advice. Therefore, a compelling argument can be made in favor of the applicability of the privilege to a discussion of fee arrangements in this context.

5. United States v. Rogers, 602 F.Supp 1332 (D. Colo. 1985); United States v. Badalamenti, supra; United States v. Ianniello, supra.

a time when important witnesses are being identified, located and prepared, when documents are being subpoenaed from third parties and from the target himself, giving rise to complex Fifth Amendment self incrimination issues, the target, also subject to personal subpoena, is effectively without the guiding hand of counsel.[6] He must await indictment, an event totally within the control of his adversary, before he can obtain court appointed counsel to begin to prepare a defense. However, by that time witnesses' memories may have eroded from years of prosecutorial delay and documents and other evidence may no longer be available for the defense.[7] This disadvantage, however, does not afflict the government because investigative agents will have interviewed favorable witnesses and memorialized their statements early in the investigation so that both the witnesses and their statements are later available to the prosecutors for trial preparation. Of course, the Jencks Act (18 U.S.C. §3500) will assure that the prosecutors need not worry about defense access to the witnesses' statements until after they have testified on direct examination at trial.

The limitations that exist in our system for the court

---

6. The fact that the Criminal Justice Act guidelines allow for the limited appointment of counsel for a grand jury witness is of little or no value to the putative defendant during a lengthy grand jury investigation. See Guide to Judiciary Policies and Procedures, Vol. VII, § 2.01(F)(2). First, unless he is actually subpoenaed the target is not entitled to appointment of counsel. Moreover, the appointment is only in connection with the subpoena and does not extend to representation for the overall investigation. Finally, compensation for counsel appointed for a grand jury witness is at the misdemeanor level, with an $800 ceiling. While extraordinary compensation is available, to equate grand jury witness representation to that normally required for a misdemeanor suggests that appointed counsel cannot expect approval of full compensation for the many hours of work required during a long grand jury investigation.

7. While focusing on the inability of the grand jury target to financially qualify for appointed counsel, the court in United States v. Reckmeyer, II, ___ F.Supp. ___ (E.D.Va., March 27, 1986, Crim. No. 85-00010-A), also stressed the need for the guiding hand of counsel during the grand jury investigation stage and observed that under the current law the defendant would not even have the presence of counsel to "obtain... advice... on such matters as whether to assert his Fifth Amendment rights." Reckmeyer at p. 12 n 3.

appointment of counsel for these complex RICO and drug cases were recently described by Judge Kane in Rogers, supra:

> Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. (Emphasis added).

Id. at 1349-50. Of course, Judge Kane raises the related problem of the effectiveness of counsel's assistance once appointed. An accused is not only entitled to the representation of an attorney, but also to representation that is effective i.e., meaningful. Thus, the putative defendant in a grand jury investigation is not only deprived of the assistance of any attorney prior to indictment because of current reading of the Sixth Amendment, but after formal charges by indictment are filed and the consequent right to appointed counsel attaches, he may not receive effective representation for the trial, as observed by Judge Kane. The unfairness of a trial in which one adversary is fully prepared and the other cannot be is obvious and raises not only Sixth Amendment issues, but Due Process questions as well. In the adversary process, the key to the reliability of fact finding is the equality of opposing counsel.

D. Available Resources Under the Criminal Justice Act

In addition to the problems described above in the availability of assigned counsel in complex RICO and drug conspiracy cases involving forfeiture, other important practical and resource limitations exist. As noted earlier, representation of indigent defendants in the federal courts is undertaken roughly equally by private counsel appointed under the Criminal Justice Act on the one hand and by federal defender organizations on the other. However, we

fear that in the event the government is successful in overcoming the Sixth Amendment and Due Process arguments against forfeiture of attorney fees, representation of the defendants in these cases, assuming they are found to be eligible for assigned counsel, will likely fall disproportionally on federal defender organizations. We would be unable to adequately handle any sizable number of these cases unless substantial additional resources are granted the Criminal Justice Act appropriation.

Two factors give rise to our conclusions. First, our experience has been that judges tend to look first to federal defender offices to assign the more difficult and time consuming cases when the need arises. Therefore, we assume that this tendency will continue and result in our appointment to represent major defendants in lengthy RICO and drug conspiracy cases who are unable to hire counsel because their assets are subject to forfeiture. While federal defenders have in the past represented defendants in complex and extended multiple-defendant RICO and drug conspiracy cases, as a general rule we tend to represent the peripheral defendants rather than the alleged central figures, who are usually represented by retained counsel. However, if these major defendants are now rendered "indigent" by the prospect of forfeiture, we expect to be called upon first to represent them. Of course, representation of an alleged central figure in a major RICO or drug conspiracy case requires a much greater expenditure of attorney time and other resources. Therefore, these cases represent a much more substantial drain on our overall resources. This level of expenditure, in turn, will adversely affect the overall quality of representation, not only for the defendant in the big case, but for our other clients as well.

The second factor which we believe will place

pressure on federal defender organizations is the anticipated reluctance of private attorneys to accept appointment under the Criminal Justice Act in major cases, even at 1984 increased compensation levels.[8] While the rate of compensation for appointed counsel was doubled in 1984, limitations and uncertainty still exist. Hourly maximums are still inadequate in many metropolitan and high cost-of-living areas. The cost of living rose by 170% in the 14 years between the rate adjustment of 1970 and 1984. Thus, current maximums are still 70% below the standards set in 1970 and that standard included a substantial discount based upon the decision by Congress to factor into the rate an attorney's obligation to render pro bono services. The Judicial Conference of the United States continues to urge Congressional passage of H.R. 3004 and S. 1581 which would allow for clearly needed and warranted increases in many high cost areas throughout the country e.g., New York, Los Angeles, San Francisco, Hawaii, Alaska.

In addition, excess compensation claims must be approved, after the fact, by the chief judge of the circuit court and the hourly rate of compensation does not cover such expense items as the services of a paralegal or associate counsel. The compensation problem has been further exacerbated by a recent Judicial Conference policy, reluctantly adopted in response to Gramm-Rudman-Hollings, providing for an across-the-board 10% cut in all attorney compensation vouchers submitted under the Criminal Justice Act during the remainder of fiscal year 1986. Furthermore, private counsel are quick to point out that RICO and major

---

8. Parenthetically, this reluctance will also have an overall adverse impact on the criminal justice system as a sufficient number of experienced attorneys will be unavailable for court appointed representation in multi-defendant cases. The difficulty is aggravated if several of these cases are pending in a jurisdiction simultaneously.

drug conspiracy cases may last years, when appeals are considered. They know that this time commitment restricts their ability to accept new clients and to properly service old ones.

In sum, the impact of extended litigation can be substantial and many experienced attorneys are, and will continue to be, reluctant to become involved. The judicial reaction to this shortage initially will be to look to federal defender offices. However, conflict of interest considerations will limit the number of defendants a single defender office can represent in a given multiple-defendant case.[9]

The overall effect of extended, multiple-defendant RICO and drug conspiracy litigation on the resources of a given federal defender office, of course, will depend upon a variety of factors, including the number of such cases assigned, the complexity of a given case and the size of the defender office attorney staff. The number of staff attorney positions in a given federal defender organization may range from a high of 20 lawyers to as few as one attorney in addition to the federal public defender, with most offices tending to be in the middle to the low end of the range. For the small office with two to four staff attorneys the impact and drain on resources of major litigation is substantial. Furthermore, given the rate of convictions in the federal courts, many cases can be expected to last beyond the trial stage and involve an appeal to which, unlike the Department of Justice with a separate appellate division, the defender staff attorney must devote an additional six months for review of thousands of pages of transcript and brief writing.

---

9. Unfortunately, the only other available source for appointments are less experienced private attorneys.

In addition, as we have demonstrated here, these cases are not assigned to counsel until after an indictment has been returned following a long grand jury investigation. As a result, an entire defender office staff must be mobilized in an effort to "catch up" to the degree of readiness of prosecutors who have worked on the case exclusively for a substantial period of time during the grand jury investigation (with the aid of investigative agencies). After arraignment, these cases involve obtaining and analyzing hundreds of pages of documents, extensive pretrial hearing and motion work and investigation that easily requires the full time attention of a single investigator (who may be the only one on the defender office staff). We are also confronted with the Jencks Act, a closed file prosecution discovery policy and other relics of an outdated discovery philosophy in the federal counts. To accomplish these tasks within the time constraints imposed by the Speedy Trial Act requires virtually the exclusive time of at least one attorney. The overall time commitment required for the "trial phase" of these cases can span anywhere from six months to a year.

Major litigation also requires resources beyond attorney time. Experts from other disciplines, such as accountants and forensic scientists are frequently needed. Judge Kane took note of this need in Rogers, supra, when he observed that "the defense of RICO accusations requires the marshalling of facts and information of vast quantities perhaps constituting the whole of several worldwide business enterprises."[10] While the Criminal Justice Act provides for expert services and most defender organizations employ full time investigators, the need for these supportive services in a complex RICO case involving sophisticated business

---

10. Id. at 1349.

practices can easily outstrip the resources available to appointed counsel. There are statutory limits on expenditures for expert and other services and obtaining judicial approval for extraordinary compensation in the large amounts generated by these cases is doubtful in this age of Gramm-Rudman-Hollings. To a significant extent the Judicial Conference's decision to reduce CJA panel attorney compensation in fiscal year 1986 by 10% was attributable to the inability to absorb unanticipated CJA expenses in the current budgetary atmosphere.

As a final point, we stress again that an important impact of major litigation on federal defender organizations is the necessity to divert attorney and other resources away from our more traditional caseload to provide representation to persons who, but for the threat of forfeiture, would be financially able to hire counsel. Without a substantial increase in resources to handle these cases, we will be unable to continue to provide a high degree of professionalism and competent representation to our other clients.

E. Conclusion

The judges in United States v. Rogers, supra, and United State v. Reckmeyer, II, supra, discussed the Due Process implications of forfeiture of attorney fees as well as the Sixth Amendment considerations. They voiced alarm over the ability of the government to dictate the choice of defense counsel by the simple device of inserting a forfeiture paragraph in an indictment. While their concern is certainly justified, the Due Process implications go deeper. Prosecutors are fully aware that a putative defendant in a grand jury investigation is not entitled to appointed counsel prior to the return of the indictment and

that experienced private defense attorneys will not gamble with their fees in cases where forfeiture is likely. Therefore, in order to cripple the preparation of a defense in a major RICO or drug conspiracy case the prosecutor need only raise the prospect of forfeiture and delay filing the indictment. Then, armed with the Speedy Trial Act, he can force an early trial that is preceded by discovery conducted under restrictive ground rules that have long ago outlived their usefulness. In this scenario the prosecutors would be opposed by a criminal defense attorney without adequate time or resources to become well - prepared for an immediate trial. This state of affairs, in turn, threatens to weaken the reliability of the fact finding process itself and will inevitably result in the conviction of innocent persons. The Department of Justice's policy undermines the role of counsel and the adversary system in favor of more easily obtained guilty verdicts.

OFFICE OF THE
FEDERAL PUBLIC DEFENDER
FOR THE
NORTHERN DISTRICT OF OHIO

EDWARD F. MAREK
FEDERAL PUBLIC DEFENDER

Honorable Strom Thurmond
United States Senate
Committee on the Judiciary
Washington D.C. 20510

June 3, 1986

Dear Senator Thurmond:

I am please to respond to the two questions set forth in your May 13, 1986 letter sent following a hearing held by the Judiciary Committee on the forfeiture of assets intended for use as attorneys' fees. We request that this response be considered in conjunction with the Statement filed on behalf of federal public and community defenders at the Committee's May 13, 1986 hearing.

Question 1

A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. CAN THE FEDERAL PUBLIC DEFENDER OFFICES ACROSS THE COUNTRY PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL IN NARCOTICS AND RACKETEERING CASES? WHY OR WHY NOT?

Attorneys in federal public and community defender offices across the country have been called upon over the years to provide representation in narcotics and racketeering cases and the representation that has been provided in response has been effective. However, complex and extended racketeering and drug conspiracy cases require enormous resources even for representation of peripheral defendants, who we generally are appointed to represent (as opposed to the alleged central conspirators who are usually represented by retained counsel). To date, the resources available under the Criminal Justice Act for representation by both private attorneys appointed under the Act and federal defender offices have been generally sufficient to handle the relatively small number of long and complex cases assigned. However, in fiscal year 1986 only ten (10) cases are expected to require an estimated expenditure of 7 to 10 million dollars. In large measure the expense involved in these 10 cases precipitated the United States Judicial Conference's across the board 10% cut in appointed counsel CJA fee bills during FY 1986.

As noted in our May 13, 1986 Statement filed with the Committee, the forfeiture provisions of the Comprehensive Crime Control Act of 1984 promise to generate a substantial number of complicated, multiple-defendant narcotics and racketeering cases where the fact, or threat, of forfeiture of assets intended for use as attorneys' fees will require judges to appoint attorneys from federal public and community defender offices to represent these newly "indigent" defendants. In addition to an increase in the sheer number of these cases, we can expect to be assigned to represent the alleged central defendants who will effectively be without assets to hire counsel. These defendants will require much greater resources then the peripheral ones.

Without a substantial increase in the Criminal Justice Act appropriation, we will not have the resources in the form of both attorneys and other services such as investigators, accountants and other experts to provide effective representation in these big cases and continue to maintain the high quality of representation now provided to our other, more traditionally financially eligible clients. In addition to the lack of adequate resources, providing effective representation in complex cases is

much more difficult to achieve for appointed counsel since current law does not generally allow for appointment of a lawyer until after indictment. As a result, while retained counsel can prepare a defense during the lengthy grand jury investigation stage, which usually precedes indictment in these cases, appointed counsel must attempt to "catch-up" to the high degree of readiness achieved by the prosecutors during the investigation stage. One federal judge has characterized appointed counsel's ability to provide effective representation under these circumstances as "patently inadequate". Thus, judicial assignment of a substantial number of complex racketeering and drug conspiracy cases at current resource levels, combined with appointed counsel's belated entry into the case, will cripple our ability to provide effective representation.

Question 2

IN CASES OF MULTIPLE, INDIGENT DEFENDANTS IN WHICH CONFLICTS ARISE, I PRESUME YOUR OFFICE WILL REPRESENT ONE DEFENDANT AND OTHERS WOULD BE REPRESENTED BY COURT APPOINTED COUNSEL. IS THERE ANY REASON THAT THIS PROCEDURE COULD NOT BE FOLLOWED IN A NARCOTICS OR RACKETEERING CASE?

The assumption contained in your question is accurate -- conflict of interest considerations require that we represent only one defendant in a multiple-defendant case. Experience under the Criminal Justice Act demonstrates that complex racketeering and narcotics cases can require the appointment of a dozen or more private attorneys. Assuming arguendo that a defendant with substantial assets subject to forfeiture is financially eligible for appointed counsel and that Fifth Amendment self-incrimination concerns do not prevent a finding of eligibility by a judicial officer (two assumptions about which we have serious reservations), we doubt that a sufficient number of experienced private attorneys will accept appointment under the Criminal Justice Act in these cases. While Congress doubled the CJA hourly compensation rates for attorneys in 1984, compensation is still 70% below the 1970 standard which even then had a substantial pro bono factor built into it. In addition, as noted earlier, attorney compensation rates under the Criminal Justice Act have recently been cut by 10% across-the-board for fiscal year 1986. These financial considerations combined with the overall adverse effect on an attorney's private practice of devoting several months exclusively to lengthy litigation will discourage many experienced attorneys from accepting assignment in big cases.

Accordingly, while courts may wish to follow the procedure of assigning a federal defender office to one defendant in a multiple-defendant narcotics or RICO case and appointing private attorneys for the other defendants, questions over a defendant's financial eligibility for appointed counsel and the availability of a sufficient number of experienced attorneys willing to accept assignment make the usefulness of this procedure doubtful. Of course, assignment of inexperienced attorneys in complex criminal litigation must be rejected since they merely delay and complicate the trial and appellate process as well as provide ineffective representation to the defendants.

We appreciate the Committee's interest in our views on this important subject and in the event additional information is required we would be most happy to respond.

With kindest regards,

Sincerely,

Edward F. Marek

Edward F. Marek
Federal Public Defender

EFM:gh

Senator GRASSLEY. Thank you, Mr. Marek.

Professor Brickey.

STATEMENT OF PROF. KATHLEEN F. BRICKEY

Professor BRICKEY. Thank you, Mr. Chairman. I ask that the written statement that I have submitted be made part of the record, also.

Senator GRASSLEY. It will be.

Professor BRICKEY. I will focus my brief remarks on the sixth amendment question, which I think has been one of the most controversial issues in this hearing.

Lower courts have been unwilling to read the forfeiture statutes in a manner that is consistent with their literal meaning and in the spirit with which the Supreme Court has construed RICO. I think these courts do so out of concern that a literal reading would violate criminal defendants' sixth amendment right to counsel and, more particularly, the right to counsel of choice.

Defense counsel in these cases argue that the mere threat of forfeiture makes lawyers unwilling to represent RICO and CCE defendants. Notwithstanding that the argument is based upon largely untested assumptions, however, it has persuaded the courts in *United States* v. *Rogers, Badalamenti, Ianniello and Reckmeyer* that to subject attorneys' fees to forfeiture would violate the sixth amendment.

The courts' reasoning in these cases is troubling in several respects. First, it overlooks a number of possibilities, particularly the possibility, as in the recent *Reckmeyer* case, that the lawyer will continue to represent the defendant despite the risk that the fee may be declared forfeited

Just 3 weeks ago, moreover, the Supreme Court rejected a remarkably similar argument in a different context. In *Evans* v. *Jeff D.,* a civil rights case, the Court basically said that that kind of argument expresses a premature concern because there is a lack of supporting empirical evidence. But the Court nonetheless expressed the belief that, as a practical matter, the likelihood of this circumstance arising is remote.

The content that these courts are trying to read into the sixth amendment right to counsel also extends beyond sixth amendment jurisprudence in analogous contexts and beyond the Supreme Court's holding in *Powell* v. *Alabama. Powell* did not fashion a constitutional principle that guarantees criminal defendants the right to be represented by a particular lawyer or law firm for a particular fee. Instead, *Powell* established the principle that a defendant should be afforded a fair opportunity to be represented by counsel of his own choice. That the defendants in these lower court cases are all represented by privately retained counsel who have very ably pressed objections to the forfeiture of attorneys' fees amply demonstrates a fair opportunity to secure counsel.

Another sixth amendment argument that RICO and CCE defendants have made is that the issuance of pretrial restraining orders prevents them from using crime-related assets to hire counsel of their choice.

Established sixth amendment jurisprudence requires appointment of counsel at the Government's expense for criminal defend-

ants who are financially unable to retain private counsel. But the court in *United States* v. *Rogers* rejected the appointed counsel solution on the ground that the complexity of the issues in RICO prosecutions demands the expenditure of time, resources, and expertise that one cannot realistically expect to obtain from a public defender's office.

Thus, in the Rogers court's view, if attorneys' fees were subject to forfeiture, no member of the private bar would represent RICO and CCE defendants and no appointed counsel could effectively represent them.

Rejection of the appointed counsel solution on sixth amendment grounds is also troubling. I wonder what would have happened, for example, if the defendant in Rogers had been a pauper who, as a result of his ineptitude as a criminal, simply had no assets to forfeit. Suppose he had made this argument to the court:

> Your Honor, I am an indigent defendant in a complex RICO prosecution. If the circumstances were different, I would ask you to appoint counsel to represent me. But as everyone knows, appointed counsel cannot effectively defend RICO cases, I have no choice, therefore, but to ask that you dismiss the indictment against me on sixth amendment grounds.

Would the Rogers court have seriously entertained that argument? It is hard to believe that any court would find a sixth amendment violation under those facts.

But does it matter, in a constitutional sense, whether the defendant had no funds to employ counsel in the first instance, as in my hypothetical, or whether the defendant had funds available but was prevented from using them because they were subject to forfeiture, as in Rogers? To answer the question affirmatively leads to the curious proposition that the sixth amendment guarantees the accused the right to use illegally obtained assets to employ counsel. But on the contrary, the court's issuance of a restraining order freezing the assets seems comparable, in a constitutional sense, to the government's seizure of money a defendant allegedly obtained by robbing a bank. Neither event would signal a violation of sixth amendment rights.

I would like to address briefly one of the ethical issues that was mentioned by Mr. Sonnett in his remarks—that is, the possibility that a lawyer will have an ethical dilemma in having to choose between a litigation strategy that would be likely to preserve forfeitable assets and a strategy that would likely result in forfeiture, but would keep the client out of prison.

Again, I would call the committee's attention to *Evans* v. *Jeff D.*, the Supreme Court case I mentioned earlier, in which the Court refused to recognize that this kind of situation poses an ethical dilemma. The Court recognized instead that the lawyer has an ethical duty to represent the client loyally and competently, but no ethical duty to seek a statutory fee award under the civil rights statutes. The Court might similarly find that a lawyer representing a RICO or CCE defendent has a duty of loyalty to the client but no ethical duty to prevent forfeitable assets as a fee.

Thank you, Mr. Chairman. That completes my summary.

[The prepared statement follows:]

PREPARED STATEMENT OF KATHLEEN F. BRICKEY

CRIMINAL FORFEITURES UNDER RICO AND THE CCE STATUTE[1]

When Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Continuing Criminal Enterprise statute (CCE) in 1970, it revived a rarity in American jurisprudence--the sanction of criminal forfeiture. Unlike their better-known in rem civil counterparts, which may be unrelated to a criminal proceeding, criminal forfeitures operate in personam against the defendant upon conviction of a crime.

Both RICO and the CCE statute make real and personal property (including profits and proceeds) acquired directly or indirectly through prohibited conduct subject to forfeiture. Both provisions broadly define the term "property" to include tangible and intangible assets, "including rights, privileges,interests, claims, and securities."[2] Neither statute expressly mentions attorneys fees.

The government's recent efforts to use RICO and CCE forfeitures to reach crime-related property has generated concern about possible infringement of the sixth amendment right to counsel. The Comprehensive Forfeiture Act of 1984 fuels that concern partly because it authorizes courts to issue pre-trial restraining orders to preserve assets subject to forfeiture. An injunction that prevents a defendant from disposing of forfeitable assets may prevent him from hiring the lawyer of his choice because he may have insufficient untainted assets to pay the legal fees the lawyer will charge.

---

[1] The text of this Statement is adapted from my forthcoming copyrighted article, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 Va. L. Rev. (1986). All rights reserved.

[2] 18 U.S.C.A. § 1963 (a),(b),(c); 21 U.S.C.A. § 853(a),(b),(c).

Even when a defendant has already paid a substantial legal fee to retained counsel before the government claims the fee is subject to forfeiture, there is no guarantee the lawyer will be able to keep the fee. To prevent RICO and CCE defendants from shielding their assets from forfeiture by transferring forfeitable property before they are convicted, the Comprehensive Forfeiture Act of 1984 makes forfeitures relate back to the time when the crime that tainted the property was committed. Because commission of a RICO or CCE violation divests the defendant of all right, title and interest in crime-related property as ofthat moment, he has no interest in forfeitable property to convey to the attorney.

To establish rights in property superior to those claimed by the government, the lawyer must prove that he received the fee before the crime was committed or that he is a bona fide purchaser for value [BFP] who at the time he received the property was reasonably without cause to believe that it was subject to forfeiture.[3] The opportunity to prove BFP status does not arise until the conclusion of the defendant's criminal trial, however, and the government may restrain the lawyer from dissipating the asset until then even though the lawyer is not suspected of any wrongdoing.

For the defendant whose only substantial assets are allegedly traceable to criminal activity, then, the government's decision to seek forfeiture may have an immediate and adverse impact on his ability to retain counsel of his choice.

Although the current forfeiture statutes are drafted broadly enough to reach assets defendants intend to use in mounting a defense, courts have greeted government efforts to do so with

---

[3] 18 U.S.C. § 1963(c); 21 U.S.C. § 863(c).

exceptional hostility. In an effort to avoid interfering with defendants' right to counsel of choice, several federal district courts have found ambiguities in unambiguous language, misread the legislative history, and stretched the contours of established sixth amendment jurisprudence beyond recognition.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

The sixth amendment guarantees the accused the right to representation by counsel "in all criminal prosecutions."[4] Although knowledgeable early commentators characterized the sixth amendment guarantee as "the right to have counsel employed for the prisoner,"[5] the text of the amendment is silent on two critical issues: (1) to what extent does the sixth amendment guarantee the accused a right to state-employed counsel if the accused cannot afford to retain counsel privately; and (2) to what extent does the sixth amendment guarantee a right to private counsel of one's own choice.

Powell v. Alabama[6] established a due process right to retained counsel in capital and non-capital cases and a right to appointed counsel in capital cases. A subsequent line of Supreme Court decisions expanded the right to appointed counsel on sixth amendment grounds, but the Court has yet to specifically address the question of how much autonomy the sixth amendment grants the defendant to select retained counsel of his choice. The Court in Powell did, however, observe that "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own

---

[4] U.S. CONST. amend. VI.

[5] See 3 J. Story, Commentaries on the Constitution § 1788 (1833).

[6] 287 U.S. 45 (1932).

choice."[7] That language is undoubtedly responsible for lower federal courts' reliance on Powell for the proposition that the right to counsel of choice is an implicit sixth amendment guarantee.[8]

Despite the federal courts' consistent acceptance of this premise, few published decisions expressly consider what policy is served by recognition of a right to counsel of choice. The Sixth Circuit, however, recently identified the need to preserve the "basic trust between counsel and client, which is a cornerstone of the adversary system" as the interest that compels recognition of the right to select privately retained defense counsel.[9]

QUALIFYING THE RIGHT TO COUNSEL OF CHOICE

The interest in providing the defendant a fair opportunity to present a defense at trial is stronger than the interest in preserving an attorney-client relationship based on mutual trust. Thus, although a criminal defendant's right to retain counsel is virtually unlimited, the right to counsel of choice is qualified.

A court's denial of a defendant's request for a continuance, for example, may prevent the defendant from securing counsel initially[10] or securing a replacement for a lawyer who

---

[7] Id. at 53 (emphasis added).

[8] See, e.g., United States v. Cicale, 691 F.2d 95, 106 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983); Linton v. Perini, 656 F.2d 207, 208 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1977); United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974); United States v. Johnston, 318 F.2d 288, 291 (6th Cir. 1963).

[9] Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982).

[10] See, e.g., United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979) (denial of second continuance after defendant failed to show good cause for delay in retaining counsel during previous four months).

has withdrawn[11] or with whom the defendant is dissatisfied.[12] Denial of a request for a continuance may also result in the severance of a satisfactory attorney-client relationship, as when counsel is unable to be present on the trial date because of scheduling conflicts[13] or illness,[14] or because the lawyer has only recently been retained and needs additional time to prepare for trial.[15]

---

[11] See, e.g., United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) (one of two lawyers representing defendant withdrew on date of trial); Lee v. United States, 235 F.2d 219 (D.C. Cir. 1956) (counsel withdrew on eve of trial with leave of the court).

[12] See, e.g., Urquhart v. Lockhart, 726 F.2d 1316 (8th Cir. 1984) (continuance requested on day of trial by defendant represented by appointed counsel and seeking to retain private counsel); United States v. Saxton, 473 F.2d 512 (5th Cir. 1973) (defendant who had ample time to retain counsel sought to discharge court-appointed counsel and retain private counsel); United States v. Pigford, 461 F.2d 648 (4th Cir. 1972) (defendant who had previously received continuances and changed counsel); United States v. Hampton, 457 F.2d 299 (7th Cir.), cert. denied, 409 U.S. 856 (1972) (indigent defendant sought to discharge court-appointed counsel and to retain different counsel with newly available family funds); United States v. Hollis, 450 F.2d 1207 (5th Cir. 1971) (court-appointed counsel sought discharge so defendant could retain counsel); United States ex rel. Baskerville v. Deegon, 428 F.2d 714, 716 (2d Cir.), cert. denied, 400 U.S. 928 (1970) (denial of request for 2 or 3 day continuance because of defendant's groundless dissatisfaction with counsel does not violate any constitutional rights; "the right to counsel of one's own choosing is not absolute"); United States v. Grow, 394 F.2d 182, 209 (4th Cir.), cert. denied, 393 U.S. 840 (1968) (defendant has no unqualified right to discharge counsel on eve of trial; only exceptional circumstances entitle defendant to continuance following last minute discharge).

[13] See, e.g., United States v. Cicale, 691 F.2d 95 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (counsel had two trials scheduled for same day); Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978) (same); United States v. Poulack, 556 F.2d 83 (1st Cir.), cert. denied, 434 U.S. 986 (1977) (attorney's schedule conflicts would require weeks long delay); United States v. Inman, 483 F.2d 738 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974) (counsel had two trials scheduled for same day); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963) (same).

[14] See, e.g., Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972) (attorney unexpectedly hospitalized); Releford v. United States, 288 F.2d 298 (9th Cir. 1961) (same).

[15] See, e.g., Morris v. Slappy, 461 U.S. 1 (1983) (attorney hospitalized for emergency surgery; substitute counsel appointed six days before trial claimed to be ready, but defendant argued additional preparation time was needed); United States v. Lamonte, 684 F.2d 672 (10th Cir. 1982) (counsel sought moderate delay to prepare where trial date followed arraignment by 10 days); Linton v. Perini, 656 F.2d 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) (new attorney objected to going to trial only 3 days after defendant discharged original counsel).

In these cases courts weigh the policy favoring the individual's interest in preserving a particular lawyer-client relationship against the sometimes conflicting policy favoring the public's interest in the fair, orderly and efficient administration of justice.[16] Although courts are deferential to the defendant's choice of counsel, they may interfere with that choice by denying requests for continuances to prevent the defendant from manipulating the court docket or unreasonably delaying the trial on the pretext of exercising sixth amendment rights.[17]

A defendant's choice of counsel may also be subordinated to the need to maintain standards of professional responsibility, as when counsel is disqualified because of a potential conflict of interest[18] or for other good cause.[19] And, of course, attorney misconduct may lead a court to discharge counsel over the client's objection in the interest of preserving the orderly

---

[16] Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) United States v. Vargas-Martinez, 569 F.2d 1102, 514 (9th Cir. 1978).

[17] Urquhart v. Lockhart, 726 F.2d 1316, 209 (8th Cir. 1984).

[18] See, e.g., United States v. James, 708 F.2d 40 (2d Cir. 1983) (defendant who desired to cooperate with government was represented by the same lawyer as another target of the investigation); United States v. Phillips, 699 F.2d 798 (6th Cir. 1983) (defendant's attorneys had previously represented another whom they intended to call as a witness); United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979) (attorney disqualified from representing defendant because as a former government attorney, he had participated in an investigation relating to the present action).

[19] United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982), cert. denied, 104 S.Ct. 2154 (1984). Cf. Ross v. Reda, 510 F.2d 1172, 1173 (6th Cir.), cert. denied, 423 U.S. 892 (1975) (the sixth amendment guarantee of counsel of one's choice is not an "unconditional right to representation in a state court by a particular out-of-state attorney, and trial court's refusal to admit out-of-state counsel pro hac vice to represent defendant did not violate defendant's sixth amendment rights when counsel refused to limit out-of-court statements about the case).

administration of justice.[20]

HOW THE RIGHT TO COUNSEL ISSUE ARISES IN FORFEITURE CASES

The right to counsel issue is emerging as a highly controversial point in RICO and CCE prosecutions in which the government seeks forfeiture of assets that would otherwise be available to pay attorneys fees. In these cases defendants contend they are prevented from hiring counsel of their choice either because a temporary restraining order prevents the use of allegedly ill-gotten gains to retain a lawyer[21] or because the known threat that assets transferred or earmarked for legal fees may later be declared forfeited makes attorneys unwilling to represent them.[22]

The first reported decision to consider this issue after the Comprehensive Forfeiture Act became effective was United States v. Rogers,[23] a Colorado district court decision. In Rogers the government sought a post-indictment restraining order prohibiting the defendants from transferring property allegedly subject to forfeiture. Counsel for the defendants entered conditional appearances, objecting to the government's petition and moving to exclude attorneys fees from forfeiture.[24]

---

[20] See, e.g., United States v. Dinitz, 538 F.2d 1214 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1977) (one of three counsel representing defendant was not a member of the local bar, had not made a proper request to appear, pursued irrelevant lines of questioning, and repeatedly exceeded the permissible scope of opening statement, causing the jury to be sent out on three separate occasions).

[21] See, e.g., United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979).

[22] See, e.g., United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) (attorneys entered conditional appearances).

[23] 602 F. Supp. 1332 (D. Colo. 1985).

[24] Id. at 1334.

While acknowledging three pre-amendment judicial decisions holding that assets transferred to an attorney remain subject to forfeiture if the attorney knows of the government's claim to the assets, the court found these cases unenlightening because the Comprehensive Forfeiture Act had since created the BFP exception.[25] The court was uncertain about how to apply the forfeiture statute to the case at hand, however, because the statute "says nothing about whether attorney fees are forfeitable."[26]

Relying on two passages in the legislative history, the court concluded that assets transferred to lawyers in exchange for legitimate services are not subject to forfeiture, but that assets transferred to an attorney in a fraudulent or sham transaction are. In reaching that conclusion the court curiously transformed the Senate Committee's statement that relief should be denied to third party nominees who receive forfeitable assets through a sham transaction, into a directive that relief should be granted in all other cases.[27] The court also read the Committee's statement out of context.

Although Rogers was a RICO forfeiture case, the court relied partly on the legislative history of the CCE forfeiture amendments to reach the conclusion that Congress was aware of the sixth amendment implications of attorneys fee forfeitures and consciously chose not to make attorneys fees forfeitable. Once again the court misread the Committee Report, this time relying on a passage stating that "[n]othing in this section [dealing with in personam forfeiture] is intended to interfere with a

---

[25] Id. at 1350-1351 (discussing United States v. Raimondo, 721 F.2d 476 (4th Cir. 1983), cert. denied, 105 S.Ct. 133 (1984); United States v. Long, 654 F.2d 911 (3d Cir. 1981); United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979).

[26] Id.

[27] Compare S. Rep. No. 225, 98th Cong., 1st Sess. 209 n.47 [hereinafter cited as Senate Report] with 602 F. Supp. at 1348.

person's Sixth Amendment right to counsel"[28] to support the conclusion that the Committee was expressing its intent not to make attorneys fees forfeitable.

Contrary to the inference drawn by the court, however, the next sentence of the Report continues: "The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case."[29] This passage clearly demonstrates that the Committee did not purport to resolve the conflict legislatively. Instead, the Committee acknowledged that its proposal simply did not address the issue.[30]

Judge Edelstein of the Southern District New York sharply criticized Rogers in a lengthy textual footnote in In Re Grand

---

[28] 602 F. Supp. at 1347 (citing Hse. Rep. 845, part 1, 98th Cong., 2d Sess., Rept. of the Comm. on the Judiciary concerning the Comprehensive Drug Penalty Act of 1984, p. 19 n.1).

[29] H.R. Rep. No. 845, Pt.1, 98th Cong., 2d Sess. 19 n.1 [hereinafter cited as House Report] (citing United States v. Meinster, No. 79-105-CR-JKL (S.D. Fla.) (court approved post-indictment transfer of assets for attorneys fees); United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979) (court approved order restraining assets then being transferred to attorney as fee); United States v. Mandel, 408 F. Supp. 679 (D. Md. 1976) (court denied restraining order in case not involving attorneys fees).

[30] The Senate Report casts further doubt upon the Rogers court's reading of the House Report. The Senate Report explains that the Act's codification of the relation back doctrine prevents a defendant from avoiding forfeiture by transferring tainted assets to another. Senate Report, supra note 26, at 200. As an example of such a result, the Report cites United States v. Long, 654 F.2d 911 (3d Cir. 1981), "in which it was held that property derived from a [CCE] violation . . . remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorneys from transferring or selling the property was properly entered." Senate Report, supra note 26, at 200 n.28.

Jury Subpoena Dated Jan. 2, 1985.[31] Shortly thereafter, two of his colleagues from the same district expressed agreement with Rogers in United States v. Badalamenti[32] and United States v. Ianniello.[33]

In the course of ruling that bona fide fees paid to a lawyer for defending the criminal charge cannot constitutionally be made subject to forfeiture, however, the courts in Badalamenti and Ianniello relied upon a highly speculative argument. In the event that assets already paid over to an attorney are subject to a threat of forfeiture, the argument runs, no attorney would be so foolish as to represent the defendant knowing that when the trial is over, the fee might be declared forfeited.[34]

---

[31] 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985). Judge Edelstein criticized Rogers' reading of the legislative history, noting the possibility that criminals may try to use attorneys to launder crime-related money and concluding that "[i]n the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds." Id. n.14 at 850. See also United States v. One Parcel of Land, 614 F. Supp. 183 (N.D. Ill. 1985) (declining to exclude attorneys fees as potentially forfeitable assets in civil forfeiture proceeding instituted under 21 U.S.C.A. § 881). Cf. President's Commission on Organized Crime, Interim Report to the President and the Attorney General, The Cash Connection: Organized Crime, Financial Institutions and Money Laundering 26, 35, 38, 45 (Oct. 1984) (citing instances in which lawyers have become involved in money laundering).

[32] 614 F. Supp. 194 (S.D.N.Y. 1985).
Judge Leval acknowledged that "a literal reading" of the forfeiture provisions would result in finding that attorneys fees are subject to forfeiture. 614 F. Supp. at 196.

[33] In United States v. Ianniello, No. S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 4, 1985) (available Sept. 20, 1985, on LEXIS, Genfed Library, Dist file), Judge Constance Baker Motley followed the Rogers court's lead and relied on the sham transaction passage in the legislative history to support the conclusion that "it is evident that bona fide attorneys' fees paid to defense counsel . . . were not intended to be forfeitable." Id.

[34] Both courts distinguished situations in which the fee already has been paid to the attorney from those in which assets in the hands of the defendant are restrained in anticipation of forfeiture. When funds with which the accused intended to hire counsel are seized, they reasoned, the accused may claim indigency and obtain appointed counsel. Badalamenti at 197. Thus, in these courts' view the forfeiture provisions may reach funds that the defendant intends to pay over to an attorney, but they may not be used to reach bona fide fees already paid to the attorney to represent the defendant in the RICO or CCE prosecution. Badalamenti at 197.

That would implicate sixth amendment concerns, according to the courts, because the defendant will presumably be stuck with a bundle of money that cannot be spent on legal services--i.e., he will not be able to persuade a lawyer to take the money. Thus, the wealthy defendant will be consigned to legal limbo: he cannot qualify financially for appointed counsel, and he cannot secure privately retained counsel because the threat of forfeiture casts a shadow on his wealth.

The courts in Badalamenti and Ianniello used a curious combination of articulated and unarticulated assumptions to project this speculative result as a "reason" for concluding that the sixth amendment makes fees paid to a criminal defense attorney immune from forfeiture. On March 27 of this year, a district court for the Eastern District of Virginia agreed with the Rogers, Badalamenti, and Ianniello courts' reasoning and holdings in United States v. Reckmeyer.[35]

The courts' reasoning in these cases is troubling in several respects. First, just three weeks ago the Supreme Court rejected as speculative a remarkably similar argument in a different context. In Evans v. Jeff D.,[36] civil rights plaintiffs accepted a settlement offer that was greater than the amount they could reasonably have expected to recover at trial. The offer, however, was conditioned on waiver of the statutory right to recover attorneys' fees. The plaintiffs' attorney later argued that such waivers should be held unenforceable under the Fees Act. To permit clients to bargain away fee awards in exchange for huge settlements could cause the pool of lawyers willing to represent civil rights plaintiffs to shrink. If that were to happen, the argument ran, the purpose of the Fees Act--to provide

---

[35] Cr. No. 85-00010-A (E.D. Va. Mar. 27, 1986) (available April 17, 1986, on LEXIS Genfed Library, Dist file).

[36] 54 U.S.L.W. 4359 (April 26, 1986).

"effective access to the judicial process" for persons with civil rights grievances--would be frustrated.[37]

The Court dismissed this concern as premature because of the lack of supporting empirical evidence, but nonetheless expressed the belief that "as a practical matter the likelihood of this circumstance arising is remote."[38] The Court might also be unwilling to rely on the implicit assumptions in the arguments accepted by Rogers and its progeny to project a speculative result as a "reason" for concluding that the sixth amendment makes fees paid to a criminal defense attorney immune from forfeiture.

Second, the content these courts are reading into the right to counsel extends beyond sixth amendment jurisprudence in analogous contexts and beyond the Supreme Court's holding in Powell v. Alabama. Powell did not fashion a constitutional principle guaranteeing criminal defendants the right to be represented by a particular lawyer or law firm for a particular fee. Instead, the Court stated that "a defendant should be afforded a fair opportunity to secure counsel of his own choice." That the defendants in Rogers, Badalamenti, Ianniello and Reckmeyer all were represented by privately retained counsel who ably pressed objections to the possible forfeiture of attorneys' fees amply demonstrates a fair opportunity to secure counsel of their choice.

CHILLING EFFECT OF THREATENED FORFEITURE

Within its most general context the sixth amendment argument boils down to an assertion that whenever the government alleges some of the defendant's assets are subject to forfeiture, the

---

[37] Id. at 4366 n.34.
[38] Id.

mere possibility that assets otherwise available to pay legal fees might be forfeited causes lawyers to refuse to represent these defendants. United States v. Rogers is once again illustrative.

In Rogers, defense counsel entered conditional appearances and claimed that if the court did not hold attorneys fees exempt from forfeiture, they would revoke their appearances.[39] If that were to happen, the defendants would not be represented at trial by their chosen lawyers.

Adopting the widely held view that the sixth amendment guarantees a qualified right to retain counsel of the defendant's choice, the court agreed that threatened forfeiture of the fees impermissibly interferes with that right because "the pretrial threat of forfeiture or an injunction on fees prevents them from using their assets to secure counsel of their choice. If counsel cannot be paid, they will not work and the clients suffer."[40]

The court failed to pursue the possibility that there might be a qualitative difference, for sixth amendment purposes, between situations like that confronted by the defendants in Powell and that in Rogers. In Powell the defendants were given little time or opportunity to locate someone who would accept their representation. The court appointed the entire bar to represent

---

[39] 602 F. Supp. at 1348. Defense lawyers employed the same strategy in United States v. Ianniello, No. S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 4, 1985) (available Sept. 20, 1985, on LEXIS, Genfed Library, Dist file). Cf. United States v. Ramey, 559 F. Supp. 60, 62 (E.D. Tenn. 1981) (appointed counsel's request to withdraw on eve of trial because of accused's dissatisfaction must be closely scrutinized; "[b]y accepting employment as counsel for [the defendant], his attorney herein stipulated impliedly that he would represent his client in this matter to a conclusion"); People v. Woods, 117 Misc.2d 1, 3, 457 N.Y.S.2d 173, 175 (Dist. Ct. 1982) (denying attorney's motion to withdraw at sentencing stage because only part of fee had been paid; attorney must have good cause to withdraw and "cannot leave his client in the middle of a matter, because he does not supply him with money, or by reason of any other difficulty").

[40] 602 F. Supp. at 1348.

them at arraignment, but failed to name any individual lawyer as their counsel. Thus, the right to counsel argument in Powell strikes at the unfairness of foreclosing any possibility that the accused will be represented by a lawyer. The court both prevented them from trying to employ counsel and failed to designate a lawyer responsible for assisting in the preparation and presentation of a defense.

Rogers presents a stunning contrast. In Rogers, the defendants had ample opportunity to employ counsel and succeeded in procuring at least conditional commitments that the lawyers would represent them. Reduced to its simplest form, their sixth amendment argument is that the government's decision to seek forfeiture impermissibly chilled their sixth amendment rights because it prompted their chosen lawyers to make a business decision to avoid a risk of nonpayment by otherwise solvent clients.

There is no suggestion that the defendants in Rogers unsuccessfully sought to secure back-up counsel to cover the contingency that their present lawyers might withdraw, or that they even considered trying to locate different lawyers to represent them when they learned of counsels' reservations about continuing the representation. Nor did they ask the court to appoint counsel to represent them.

Instead, the court accepted on faith the arguments that no member of the bar would accept employment under these circumstances and that no public defender or other appointed counsel could effectively defend them.

IMPACT OF RESTRAINING ORDERS

A pre-trial restraining order that prevents a defendant from transferring some or all of his assets also imposes a direct or

indirect burden on the exercise of sixth amendment rights. Three cases decided before the Comprehensive Forfeiture Act became effective illustrate this point.

In United States v. Bello,[41] the government sought a restraining order enjoining the defendant's disposition of designated assets, including real estate the defendant was in the process of transferring to his attorney to satisfy the attorney's fee. The restraining order therefore directly interfered with Bello's arrangement to pay counsel, and Bello claimed that he could not otherwise do so. In United States v. Ray,[42] the defendant was restrained from disposing of assets "excepting expenditures for the necessities of life,"[43] and the court refused to modify the restraining order to permit payment of his privately retained attorney. In United States v. Lewis, a pre-trial restraining order preventing disposition of interests in twenty-one pieces of real and personal property virtually reduced the defendant "to the status of a 'pauper.'"[44]

COURT APPOINTED COUNSEL

If restraining orders like those in Bello, Ray, and Lewis deprive defendants of the means to hire private counsel they are, of course, entitled to court-appointed counsel. That places in issue the question whether the availability of appointed counsel eliminates sixth amendment concerns in cases where a restraining order prevents a non-indigent defendant from hiring private counsel of his choice.

The court in Bello was not troubled by the appointed counsel

---

[41] 470 F. Supp. 723 (S.D. Cal. 1979).

[42] 731 F.2d 1361 (9th Cir. 1984).

[43] 731 F.2d at 1365.

[44] 759 F.2d 1316, 1326 (8th Cir.), cert. denied, 88 L.Ed.2d 357 (1985).

solution, but the court's response was somewhat hypothetical since the restraining order had not yet issued. The court in Ray responded creatively to the defendant's resulting inability to pay his attorney by appointing the same lawyer whom he had privately retained to represent him. In Lewis, the court found no violation of the defendant's right to counsel of choice because when the court appointed counsel to represent him he did not request the appointment of any other particular attorney.

As the decisions in Bello, Ray, and Lewis demonstrate, then, some courts will be satisfied that the appointment of counsel to represent defendants restrained from using assets to pay legal fees fulfills sixth amendment requirements.[45]

The court in Rogers, on the other hand, flatly rejected the notion that appointed counsel adequately addressed the problem. The time, expense, and expertise required to defend complex RICO charges make it inappropriate to relegate the responsibility of representing RICO defendants to the public defender's office, according to the court.

It may be possible to distill the Rogers court's analysis on this point to the truism that the wealthy are able to hire better lawyers than the poor.[46] While that cannot be denied, the proposition has no implicit constitutional significance.

---

[45] Accord United States v. Ianniello, No. S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 4, 1985), at n.2 (available Sept. 20, 1985, on LEXIS, Genfed Library, Dist file) (but finding that where counsel had been retained before indictment and had been preparing complex case for trial for several months, restraining order must be modified to permit payment of attorneys fees or else defendants would be deprived of a necessity of life); United States v. Badalamenti, 614 F. Supp. 194, 197 (S.D.N.Y. 1985) (dictum); In Re Grand Jury Subpoena Dated Jan 2, 1985 (Payden v. United States), 605 F. Supp. 839, 853 n.19 (S.D.N.Y. 1985) (dictum), reversed on other grounds, 767 F.2d 26 (2d Cir. 1985).

[46] Cf. United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) (finding in the sixth amendment argument the "implicit claim that the rich can afford better lawyers than the poor").

Instead, it merely reflects "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."[47]

THE IMPORTANCE OF PROPERTY RIGHTS IN FORFEITURE CASES

Determining the defendant's rights in contested assets is a paramount consideration in forfeiture cases, and two important collateral issues emerge from that premise.

First, consideration of the sixth amendment question usually proceeds from the factual premise that issuance of the restraining order caused the defendant's inability to hire a lawyer. But since the constitution does not prohibit the criminal prosecution of indigents, it seems necessary to address the question whether the reason for the defendant's inability to pay is constitutionally relevant. Does it matter, in a constitutional sense, whether the defendant had no funds to employ counsel in the first instance or whether the defendant had funds available but was prevented from using them because they were subject to forfeiture?

To answer the question affirmatively would lead to the rather curious proposition that the sixth amendment guarantees the accused the right to use illegally obtained assets to employ counsel. To the contrary, a court's issuance of a restraining order freezing such assets seems comparable, in a constitutional sense, to the government's seizure of money a defendant allegedly

---

[47] Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., concurring). Cf. Ford v. Israel, 701 F.2d 689 (7th Cir.), cert. denied, 464 U.S. 832 (1983) (application of rule requiring local counsel to appear in all cases, even when party has out of state counsel, did not deny defendant's sixth amendment rights simply because he could not afford to hire both his chosen counsel and local counsel); United States v. Brodson, 241 F.2d 107, 111 (7th Cir.), cert. denied, 354 U.S. 911 (1957) (rejecting claim that since jeopardy assessment prevented defendant from hiring lay experts of his choosing, defendant's constitutional rights were violated; manner in which defendant becomes indigent is immaterial).

obtained by robbing a bank.[48] Neither event would signal a violation of sixth amendment rights.

The second and more substantial issue relates to the fundamental question of the defendant's legal right to the assets. Because commission of a RICO or CCE violation taints crime-related property, all right, title and interest in the property vests in the United States at that time.[49] Thus, RICO and CCE defendants cannot convey title to forfeitable property to their attorneys.

---

[48] Cf. In Re Grand Jury Subpoena Dated Jan. 2, 1985 (Payden v. United States), 605 F. Supp. 839, 850 n.14 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985) ("Fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services from the Rolls-Royce of attorneys from these same tainted funds."); United States v. Strawser, 581 F. Supp. 575, 578 (C.D. Ill. 1984) ("A convicted drug dealer should not be allowed to pay an excessive, unethical fee with drug profits. . . . Such a shelter is indistinguishable from a drug dealer being allowed to insulate his profits . . . by making a gift to a friend.").

[49] 18 U.S.C.A. § 1963(c); 21 U.S.C.A. § 853(c).

The wording through which the Comprehensive Forfeiture Act incorporates the relation back doctrine is somewhat imprecise. The Act provides that "[a]ll right, title, and interest in property . . . vests in the United States upon the commission of the act giving rise to forfeiture." 18 U.S.C.A. § 1963(c); 21 U.S.C.A. § 853(c) [hereinafter referred to in this note as subsection c]. The legislative history repeats this language without offering further guidance for determining what act gives rise to a forfeiture in any given case. See Senate Report, supra note 26, at 200-01. The lack of clarifying or defining language has led at least one commentator to conclude that the statute leaves unresolved the significant question whether the forfeiture relates back to "the commission of the predicate acts or each of the elements of the enterprise offense." Buffone, Forfeiture of Attorneys' Fees and the Effect of the Crime Control Act of 1984, 1 Drug L. Rep. 147, 149 (1985).

Because the government's interest vests "upon commission of the act giving rise to forfeiture under this section," however, subsection (c) should be read together with subsection (a), which states the threshold requirement for RICO and CCE forfeitures. Under RICO, any person who "violates . . . section 1962" shall be fined and/or imprisoned "and shall forfeit" designated property interests. 18 U.S.C.A. § 1963(a). Under the CCE statute, anyone who is "convicted of a violation" of designated drug felony provisions "shall forfeit" property bearing specified relations to the violation. 21 U.S.C.A. § 853(a). The threshold requirement, then, must be a substantive RICO or drug felony violation, which requires coalescence of all the elements of the offense.

The problem, of course, is the timing of the decision regarding whether the property is actually subject to forfeiture. Since RICO and CCE forfeitures are in personam, the question whether the defendant is entitled to the contested property is intimately connected with the question of his guilt. The determination that property is actually subject to forfeiture is made at the end of the defendant's criminal trial and only upon his conviction. When the government obtains a restraining order, it will have established no more than probable cause to believe the property is forfeitable. If the jury ultimately convicts but finds the property not subject to forfeiture, a restraining order that has prevented the defendant from transferring the assets in exchange for legal services will have prejudiced his exercise of sixth amendment rights.

PRE-TRIAL SEIZURE OF ASSETS IN OTHER CONTEXTS

Several state criminal defendants have successfully challenged the state's retention of currency seized by the police on the ground that the money would otherwise have been available to retain private counsel of their choice.[50] In none of these cases did the state claim that the money was marked or was contraband. Instead, the state asserted as reasons for retaining the money the desire to reimburse the cost of the public defender's representation, to pay any fine that might be assessed against the defendant, or for use as evidence.

The courts in these cases were sympathetic to the claim that the seizure and retention of the assets impermissibly interfered with the defendants' right to counsel of choice, and the opinions share a common thread: the state must not unreasonably interfere

---

[50] See, e.g., State v. Brierly, 320 F. Supp. 406 (E.D. Pa. 1970); People v. Holland, 151 Cal. Rptr. 625, 588 F.2d 765 (1978); People v. Vermouth, 42 Cal.3d 77, 151 Cal. Rptr 625, 588 P.2d 765 (1978).

with a defendant's desire to use every legitimate resource to defend the charges against him in whatever manner he deems best.[51] Rather than framing the issue in terms of whether appointed counsel was available or competent, the courts addressed the question whether the defendant was improperly deprived of the opportunity to use his own funds to retain counsel. Each defendant "was entitled to counsel of his choice because he could afford it."[52]

Although this category of cases implicates the same constitutional concerns as the RICO and CCE forfeiture cases, they are distinguishable. The states had no legal basis for retaining the property and their refusal to return the assets arbitrarily interfered with the defendants' use of their own money to defend criminal charges. In contrast, however, the issue in RICO and CCE forfeiture cases is whether the defendant has been divested of ownership in the assets. When the government obtains a restraining order freezing the assets, it does so under authority of statute. Thus, the interference with the defendant's use of the assets is not arbitrary.

A more closely analogous line of cases arises out of taxpayers' challenges to summary levies on their property by the Internal Revenue Service (IRS). Two summary IRS procedures authorize the Service to seize a taxpayer's assets before the taxpayer has an opportunity to challenge the validity of the assessment in court.[53] These "pay now, litigate later" procedures confer awesome power on the IRS. They give the

---

[51] People v. Holland, 23 Cal.3d 77, 151 Cal. Rptr. 625, 632, 588 P.2d 765, 771 (1978) (S.Ct. Cal. 1978) (quoting People v. Crovedi, 65 Cal.2d 199, 207-08, 53 Cal. Rptr. 284, 290, 417 P.2d 868, 874 (1966)).

[52] United States ex rel. Ferenz v. Brierly, 320 F. Supp. 406, 409 (E.D. Pa. 1970).

[53] The summary procedures are jeopardy assessment, 26 U.S.C. § 6861, and termination of the taxable year. 26 U.S.C. § 6851.

sovereign a "stranglehold on a taxpayer's assets"[54] and are capable of creating indigency overnight.[55] Thus, the plight of a taxpayer who is subjected to a summary assessment procedure and is criminally prosecuted while the assets are frozen seems comparable to the plight of a RICO or CCE defendant whose assets are threatened with forfeiture.

Like RICO and CCE cases, the summary assessment cases present a triable issue of fact as to the ownership of the assets and proceed under the government's statutory claim to the contested property. Courts in the summary assessment cases have insisted that taxpayers who challenge the levy must follow the specific statutory procedures for contesting an assessment, which usually requires litigation of the issue in a separate suit.[56] Criminal defendants may not circumvent that statutory route by seeking to enjoin the assessment in order to make assets available for use in defending the criminal charges[57] or by seeking dismissal of the indictment.[58]

Here the importance of the RICO and CCE statutory procedures for determining the ownership of allegedly forfeitable assets

---

[54] Homan Mfg. Co. v. Long, 242 F.2d 645, 651 (7th Cir. 1957).

[55] Clark v. Campbell, 501 F.2d 108, 122-23 (5th Cir. 1974).

[56] United States v. Rubio, 404 F.2d 678, 681 (7th Cir. 1968), cert. denied, 394 U.S. 993 (1969) (defendant's claim represents, in effect, an attempt to contest the jeopardy assessment in a criminal narcotics prosecution); Freistak v. Egger, 551 F. Supp. 238, 244 (M.D. Pa. 1982) (defendant failed to preserve right to judicial review of adverse administrative decision by failing to file a timely petition); Rosenblum v. United States, 549 F.2d 1140, 1145-1146 (8th Cir.), cert. denied, 434 U.S. 818 (1977) (Tax Court is proper forum for taxpayers to litigate due process claims arising from jeopardy assessments).
Taxpayer remedies include suit for a refund, see 26 U.S.C. § 7422, and abatement. See 26 U.S.C. § 6851(b), (c), § 6861(g).

[57] United States v. Marshall, 526 F.2d 1349, 1354 (9th Cir. 1975), cert. denied, 426 U.S. 923 (1976).

[58] United States v. Allied Stevedoring Corp., 138 F. Supp. 555, 559 (S.D.N.Y. 1956).

becomes apparent. Under both statutory schemes the question whether property is subject to forfeiture is resolved at the end of the criminal trial. Only after a defendant is convicted of a RICO or CCE violation and a special jury verdict declares the assets forfeitable do the statutes provide procedures for adjudicating the rights of third parties who assert interests in the property.[59] Neither statute provides for accelerated consideration of third party claims to the property.

Thus, in a very real sense RICO and CCE defendants and their lawyers are attempting to do what courts in the assessment cases have refused to permit--i.e., making an end run around statutory procedures that defer resolution of conflicting claims in the assets.

DEFERRED ADJUDICATION OF SIXTH AMENDMENT ISSUES

Courts in the tax assessment cases defer consideration of criminal defendants' claims that a levy will adversely affect their sixth amendment rights until the end of the criminal trial on the theory that it is impossible to predict what effect the levy will actually have on the defendant.[60] This practice forwards the policy that courts should avoid premature consideration of constitutional issues.[61] It is possible, for example, that the defendant may become able to borrow money,[62]

---

[59] 18 U.S.C.A. § 1963(c), (m); 21 U.S.C.A. § 853(c), (n).

[60] Illinois Redi-Mix Corp. v. Coyle, 360 F.2d 848, 849 (7th Cir. 1966); Lloyd v. Patterson, 242 F.2d 742, 744 (5th Cir. 1957); Avco Delta Corp. Canada Ltd. v. United States, 484 F.2d 692, 706-07 (7th Cir. 1973); Human Engineering Institute v. Comm'r Int. Rev., 61 T.C. 61, 67 (1973); Shapiro v. Commissioner of Int. Revenue, 73 T.C. 313, 315-16 (1979), cert. denied, 449 U.S. 1082 (1981).

[61] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71-72 (1961).

[62] United States v. Brodson, 241 F.2d 107, 110 (7th Cir.), cert. denied, 354 U.S. 911 (1957); Human Engineering Institute v. Comm'r Int. Rev., 61 T.C. 61, 68 (1973).

that the court may release some of the restrained assets,[63] that a claimed need to hire an expert will become moot,[64] that the defendant might plead guilty[65] or nolo contendere,[66] or that a jury might acquit or the government might dismiss the indictment.[67]

Adjudication of the constitutional issue could similarly be deferred until the conclusion of the defendant's trial in RICO and CCE prosecutions.[68] At the very least the accused would be represented by appointed counsel, but it is by no means certain that he would not be represented by a privately retained lawyer. Original counsel, for example, might continue to represent the defendant,[69] the defendant might obtain other disposable assets,[70] or the defendant who owns some assets not covered by

---

[63] Human Engineering Institute v. Comm'r Int. Rev., 61 T.C. 61, 64 (1973).

[64] Summers v. United States, 250 F.2d 132, 134-35 (9th Cir. 1957); United States v. Brodson, 241 F.2d 107, 110 (7th Cir.), cert. denied, 354 U.S. 911 (1957).

[65] United States v. Brodson, 241 F.2d 107, 110 (7th Cir.), cert. denied, 354 U.S. 911 (1957).

[66] See, e.g., Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957).

[67] United States v. Brodson, 241 F.2d 107, 110 (7th Cir.), cert. denied, 354 U.S. 911 (1957).

[68] See United States v. Reckmeyer, Cr. No. 85-00010-A (E.D. Va. Mar. 27, 1986) (available April 17, 1986, on LEXIS Genfed Library, Dist file).

[69] Cf. United States v. Reckmeyer, Cr. No. 85-00010-A (E.D. Va. Mar. 27, 1986) (available April 17, 1986, on LEXIS Genfed Library, Dist file) (law firm continued to represent drug defendant even though defendant was restrained from disposing of assets); United States v. Allied Stevedoring Corp., 138 F. Supp. 555 (S.D.N.Y. 1956) (attorney who argued for corporate defendant admitted he would continue the representation even if the motion to dismiss the indictment were denied); O'Connor v. United States, 203 F.2d 301 (4th Cir. 1953) (defendant was represented by his own lawyer, who apparently continued the representation following a jeopardy assessment and levy against the client's assets); Freistak v. Egger, 551 F. Supp. 238 (M.D. Pa. 1982) (defendant was apparently represented through post-trial motions by privately retained counsel).

[70] Cf. United States v. Hampton, 457 F.2d 299 (7th Cir.), cert. denied, 409 U.S. 856 (1972) (indigent defendant sought to discharge court-appointed counsel and to retain different counsel with newly available family funds); United

the restraining order might retain another lawyer who is willing to accept a more modest fee.[71]

Courts in the summary assessment cases address the merits of the issue from the premise that the sixth amendment confers no constitutional right to have funds made available "to pay for counsel of one's own choosing."[72] Only those who have personal assets are entitled to privately retained counsel.[73] If the accused is indigent he is entitled to appointed counsel,[74] but

---

States v. Sexton, 473 F.2d 512 (5th Cir. 1973) (defendant who had ample time to retain counsel sought to discharge court-appointed counsel and retain private counsel); United States v. Hollis, 450 F.2d 1207 (5th Cir. 1971) (court-appointed counsel sought discharge so defendant could retain counsel); Urquhart v. Lockhart, 726 F.2d 1316 (8th Cir. 1984) (continuance requested on day of trial by defendant represented by appointed counsel and seeking to retain private counsel); United States v. Brodson, 241 F.2d 107, 109 (7th Cir.), cert. denied, 354 U.S. 911 (1957) (defendant obtained loans in excess of $17,000 following jeopardy assessment, including a $1,000 advance to an attorney).

[71] Cf. United States v. Reckmeyer, Cr. No. 85-00010-A (E.D. Va. Mar. 27, 1986) (available April 17, 1986, on LEXIS Genfed Library, Dist file) (law firm that negotiated guilty plea for drug defendant charged fee exceeding $170,000); United States v. Badalamenti, 614 F. Supp. 194, 195 (S.D.N.Y. 1985) (government unsuccessfully tried to subpoena information concerning attorney's fee arrangement with narcotics defendant, where the fee paid was believed to be "in the vicinity of $500,000"); In Re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Payden v. United States), 605 F. Supp. 839, 850 n.14 (defendant is not entitled "to obtain the Rolls-Royce of attorneys" with fruits of crime), reversed on other grounds, 767 F.2d 26 (2d Cir. 1985); United States v. Strawser, 581 F. Supp. 875, 878 (C.D. Ill. 1984) (characterizing $47,500 fee for negotiating two relatively simple guilty pleas excessive and unethical); Margolin, Forfeiture of Attorneys Fees and the Future of the Criminal Defense Bar, 9 The Champion 10, 11 (June, 1985) ("the economic facts of life in a capitalist society [are that] the best and most famous command the highest fees"). But see Morris v. Slappy, 461 U.S. 1, 23 (1983) ("Undoubtedly, we must accept the harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy.") (Brennan, J., concurring).

[72] Shapiro v. Commissioner of Int. Revenue, 73 T.C. 313, 316 (1979), cert. denied, 449 U.S. 1082 (1981) (civil case stating that this proposition is true in both civil and criminal cases) (emphasis added).

[73] United States v. Marshall, 526 F.2d 1349, 1355 (9th Cir. 1975), cert. denied, 426 U.S. 923 (1976).

[74] United States v. Rubio, 404 F.2d 678 (7th Cir. 1968), cert. denied, 394 U.S. 993 (1969) (defendant's claim that delay in returning seized assets denied him effective assistance of counsel does not, standing alone, establish a sixth amendment violation; no prejudice was shown).

the reason why the defendant lacks the resources to retain counsel is considered constitutionally irrelevant.[75] The sixth amendment does not guarantee a right "to be represented by a particular law firm for a particular fee agreed upon in advance."[76]

This line of decisions comports with established sixth amendment jurisprudence in other contexts. The right to be represented by particular counsel is not absolute, even assuming unlimited assets to pay. Just as the defendant's personal interest in being represented by a particular lawyer may be subordinated to the interests of judicial economy or standards of professional integrity,[77] so may his interest in being represented by retained as opposed to appointed counsel be subordinated to those same interests.[78]

The sixth amendment, moreover, guarantees the right to use every legitimate asset to obtain the assistance of counsel.[79] A defendant who has no assets must be provided the "basic tools of

---

[75] United States v. Brodson, 241 F.2d 107, 111 (7th Cir.), cert. denied, 354 U.S. 911 (1957).

[76] Rosenblum v. United States, 549 F.2d 1140, 1146 (8th Cir.), cert. denied, 434 U.S. 818 (1977) (civil case where court assumed arguendo a right to counsel in civil cases).

[77] See supra at text accompanying notes 9-19.

[78] Cf. United States v. Hampton, 457 F.2d 299 (7th Cir.), cert. denied, 409 U.S. 856 (1972) (indigent defendant sought to discharge court-appointed counsel and to retain different counsel with newly available family funds); United States v. Saxton, 473 F.2d 512 (5th Cir. 1973) (defendant who had ample time to retain counsel sought to discharge court-appointed counsel and retain private counsel); United States v. Hollis, 450 F.2d 1207 (5th Cir. 1971) (court-appointed counsel sought discharge so defendant could retain counsel); Urquhart v. Lockhart, 726 F.2d 1316 (8th Cir. 1984) (continuance requested on day of trial by defendant represented by appointed counsel and seeking to retain private counsel).

[79] See People v. Holland, 23 Cal.3d 77, 151 Cal. Rptr. 625, 630, 588 P.2d 765, 771 (1978) (S.Ct. Cal. 1978) (quoting People v. Crovedi, 65 Cal.2d 199, 207-08, 53 Cal. Rptr. 284, 290, 417 P.2d 868, 874 (1966)).

an adequate defense or appeal"[80] to insure "meaningful access to justice,"[81] but the Court has never held that the government "must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy."[82]

ADDRESSING ETHICAL CONCERNS

Two dominant ethical concerns arise in this context. First is the possibility that an attorney whose fee may be subject to forfeiture may have a conflict of interest because a litigation strategy that would most likely result in the preservation of the fee might not be in the defendant's best interest.[83] Second, to qualify as a BFP entitled to keep goods subject to forfeiture, the lawyer must establish that when he received the fee he was "reasonably without cause to believe" it was subject to forfeiture. Even though fee information is not usually considered privileged,[84] a lawyer confronted with this situation may be concerned that he will have to testify about his client's financial affairs and possibly compromise privileged communications.[85]

---

[80] Britt v. North Carolina, 404 U.S. 226, 227 (1971).

[81] Ake v. Oklahoma, 105 S.Ct. 1087, 1094 (1985).

[82] Id. (holding that under limited circumstances the state must provide an indigent defendant who raises insanity defense access to a competent psychiatrist).

[83] United States v. Reckmeyer, Cr. No. 85-00010-A (E.D. Va. Mar. 27, 1986) (available April 17, 1986, on LEXIS Genfed Library, Dist file); United States v. Ianniello, No. S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 4, 1985) (available Sept. 20, 1985, on LEXIS, Genfed Library, Dist file); United States v. Badalamenti, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985).

[84] See United States v. Jeffers, 532 F.2d 1101, 1115 (7th Cir. 1976); In re Michaelson, 511 F.2d 882, 888-89 (9th Cir. 1975); Wirtz v. Fowler, 372 F.2d 315, 332 (5th Cir. 1966); Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962); United States v. Pape, 144 F.2d 778, 782 (2d Cir. 1944).

[85] United States v. Reckmeyer, Cr. No. 85-00010-A (E.D. Va. Mar. 27, 1986) (available April 17, 1986, on LEXIS Genfed Library, Dist file) United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); In Re Grand Jury Subpoena Dated Jan. 2, 1985 (Payden v. United States), 605 F. Supp. 839, n.14 at 850 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985); United States v. Rogers, 602 F. Supp. 1332, 1348 (D. Colo. 1985).

The ethical issues are not insurmountable, however. It is not entirely clear, for example, that the Supreme Court would view all of the professional responsibility problems raised by defense counsel as true "ethical dilemmas." In Evans v. Jeff D., the civil rights case mentioned earlier, the lawyer argued that settlements that are conditioned on the waiver of statutory recovery of attorneys' fees pose an ethical dilemma for plaintiffs' lawyers. The Court was unimpressed with the argument, observing that "we do not believe that the 'dilemma' was an 'ethical' one in the sense that [the lawyer] had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, [he] had no ethical obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently."[86] It is entirely possible that the Court could likewise view the plight of the criminal lawyer whose fee may be subject to forfeiture as having an ethical duty to serve his client loyally, but no ethical duty to preserve forfeitable assets as a fee.

Recently issued Justice Department guidelines,[87] moreover, address the ethical concerns by requiring certain threshold criteria to be met before United States Attorneys may seek forfeiture of assets transferred as attorneys fees, and by requiring high level Justice Department review of every decision to seek such forfeitures.[88] When assets have been transferred in a bona fide exchange for legal representation in a criminal matter, the government must have reasonable grounds to believe

---

54 U.S.L.W. 4359, 4362 (April 26, 1986).

[87] U.S. Att'y Manual § § 9-111.000 through 9-111.700, reprinted in 38 Crim. L. Rep. 3001-3008 (Oct. 2, 1985). The guidelines specify separate criteria for forfeiture when attorneys fees are paid for representation in a civil matter. Id. at § 9-111.420.

[88] All criminal forfeiture proceedings instituted to forfeit assets transferred as attorneys fees must receive prior approval from the Assistant Attorney General, Criminal Division, in accordance with the guidelines. Id. at § 9-111.300.

that the attorney had actual knowledge[89] of the forfeitability of the particular asset[90] at the time of transfer.[91] Actual knowledge of forfeitability may be established by evidence of knowledge that the government has formally asserted a forfeiture claim against a particular asset[92] or by evidence that the lawyer knew the asset was in fact derived from criminal misconduct,[93] but not by evidence obtained through compelled disclosure of confidential communications made during the course of the representation.[94]

These guidelines should substantially reduce potential conflicts of interest. Issuance of an indictment containing a general forfeiture allegation[95] or a veiled threat that the

---

[89] Id. at § 9-111.430.

[90] Id. at § 9-111.510.

[91] Id. at § 9-111.430. "[A] transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others." Id. at § 9-111.501.

[92] Id. § 9-111-511. Knowledge of the government's claim may be established in essentially three ways: proof of (1) knowledge that the particular asset is the subject of a civil forfeiture proceeding; (2) knowledge that the particular asset is subject to a pre-indictment or pre-conviction restraining order in connection with a criminal prosecution; and (3) knowledge that the particular asset is the subject of a forfeiture allegation in a criminal indictment. With respect to the latter category, the wording of the indictment is critical. A specific description of the asset would establish knowledge, whereas a generic description or an all-inclusive forfeiture allegation would not, without more. Id.

[93] Id. § 9-111.512. The government may rely upon a client's trial testimony, voluntary disclosure of communications with his attorney, and other uncompelled disclosures of confidential communications to establish the attorney's knowledge of forfeitability. The government may, in addition, consider such facts as the method and manner of payment of the fee and the attorney's knowledge of the client's livelihood, together with generic or all-inclusive forfeiture allegations, when determining whether it is reasonable to believe the attorney knew the asset was derived from criminal misconduct. Id.

[94] Id. at § 9-111.430. See id. at § § 9-111.512 through 9-111.610. Although non-privileged fee information may be subpoenaed, id. at § 9-111.620, Justice Department policy requires approval by the Assistant Attorney General, Criminal Division, before an attorney may be subpoenaed to provide information that relates to the representation of a client. Id. at § 9-2161(a). No attorney may be subpoenaed to provide client-related information unless "there are reasonable grounds to believe . . . that the information sought is reasonably needed," the need for the information outweighs "the potential adverse effects on the attorney-client relationship," and reasonable efforts to obtain the information from other sources have been unavailing. Id.

government may later attempt to satisfy a judgment of forfeiture by levying on an attorney's fee[96] will not, without more, charge the attorney with knowledge that specific assets transferred to pay the fee are subject to forfeiture.[97] The specificity requirement should also alert counsel to the potential forfeitability of given assets and enable him to identify "clean" assets--i.e., assets the government has not yet alleged are subject to forfeiture--that may be used instead to pay the legal fee. The guidelines should also simplify the defense lawyer's task of predicting whether his testimony at a post-trial hearing would be likely to compromise client confidences.

These guidelines seek to achieve a workable balance between the goals of avoiding unnecessary intrusions into the attorney-client relationship and preventing offenders from benefitting economically from their wrongdoing. When considered together with properly understood sixth amendment jurisprudence, these checks on the exercise of prosecutorial discretion should allay the concern that fee forfeitures violate the right to counsel and undermine the defense attorney's role in the adversary process.

---

[95] See id. at § 9-111.511.

[96] In Ianniello, for example, the government obtained an ex parte order restraining the disposition of certain property owned by the defendants or by companies they controlled. The government then advised the defendants and defense counsel that if the defendants were convicted of RICO violations and judgments of forfeiture were entered, "the Government might seek to obtain attorneys' fees paid to counsel to satisfy the judgments."

[97] U.S. Atty's Manual § 9-111.530.

> [I]t is inappropriate to give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines. Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice . . . . [unless the] attorney has actual knowledge--based on facts and information other than that contained in the written notice--that the asset is subject to forfeiture.

Id.

RESPONSES OF PROFESSOR KATHLEEN BRICKEY TO WRITTEN QUESTIONS FROM SENATOR THURMOND

THE 6TH AMENDMENT GUARANTEES A DEFENDANT THE RIGHT TO COUNSEL. DOES THIS GIVE THE DEFENDANT THE RIGHT TO HAVE THE BEST DEFENSE COUNSEL AVAILABLE OR IS IT ONLY NECESSARY THAT HE HAVE COUNSEL WHO PROVIDES EFFECTIVE ASSISTANCE? IS THE 6TH AMENDMENT RIGHT TO COUNSEL A QUALIFIED RIGHT?

The sixth amendment guarantees the right to be represented by counsel in all criminal prosecutions. But while the right to counsel is absolute, the right to counsel of choice is qualified. A defendant's interest in being represented by a particular lawyer may be subordinated to other interests, such as encouraging judicial economy and maintaining standards of professional responsibility.

A court, for example, may deny a defendant's request for a continuance in order to avoid undue delay of the trial, even though the defendant's chosen lawyer cannot be present on the date of trial. Or a court might disqualify the defendant's chosen counsel because the lawyer has an apparent conflict of interest. A defendant's interest in being represented by <u>retained</u> as opposed to appointed counsel may also be subordinated to these same interests. A court need not acquiesce, for example, if the defendant desires to discharge appointed counsel on the eve of trial in order to use newly obtained funds to employ private counsel.

That the rich may be represented by better lawyers than the poor is constitutionally irrelevant. The sixth amendment does not guarantee the right to be represented by the best counsel available. Instead, the sixth amendment guarantees the right to

effective assistance of retained or appointed counsel to insure the defendant meaningful access to justice.

DOES THE CONSTITUTION MANDATE A CRIMINAL DEFENDANT HAS THE RIGHT TO RETAIN DEFENSE COUNSEL OF HIS CHOICE WITHOUT REGARD TO HOW THE MONEY FOR THE FEE IS GENERATED?

No. The sixth amendment guarantees a fair opportunity to secure counsel of choice. If the defendant is financially unable retain private counsel, the sixth amendment requires the appointment of state-employed counsel. The constitution neither forbids prosecution of the indigent nor requires the government to make assets available to pay for private counsel.

At the Hearing, Senator Metzenbaum expressed doubt about whether a court would appoint counsel to represent an apparently wealthy drug defendant whose assets the government claimed were subject to forfeiture. The eligibility test for appointed counsel under the Criminal Justice Act is financial ability to retain private counsel, rather than indigency or access to funds. Thus, if a RICO or CCE restraining order has frozen the wealthy drug defendant's assets so he cannot use them to pay legal fees, he would be financially unable to hire a lawyer and would be eligible for appointed counsel.

THE JUSTICE DEPARTMENT GUIDELINES ALLOW SUBPOENAS TO BE ISSUED TO ATTORNEYS REQUIRING APPEARANCE BEFORE FEDERAL GRAND JURIES FOR INFORMATION RELATING TO REPRESENTATION OF A CLIENT. WHAT TYPE OF QUESTIONS COULD BE ASKED THAT WOULD NOT VIOLATE THE ATTORNEY-CLIENT PRIVILEGE?

The purpose of the attorney-client privilege is to provide those seeking legal advice the opportunity to freely communicate confidences to a legal advisor without fear that the confidences

will later be disclosed. Because the privilege is an exception to the rule that anyone with knowledge of the truth may be called to testify, it is strictly confined to protect those matters that might not have been disclosed without the privilege. Thus, the privilege applies only to confidential communications made to an attorney by a client for the purpose of seeking legal advice.

Although there are recognized exceptions to the general rule, fee information usually is not considered privileged because it is not communicated for the purpose of obtaining legal advice or assistance. Thus, an attorney who is subpoenaed to testify before a grand jury could normally answer questions about the amount and form of payment of his client's fee without violating the attorney-client privilege. The attorney could also disclose the identity of a third party who paid a fee on his client's behalf.

IS ISSUANCE OF AN INJUNCTION OR RESTRAINING ORDER BY A FEDERAL JUDGE PREVENTING A NARCOTICS DEFENDANT OR RACKETEERING DEFENDANT FROM DISPOSING OF HIS ASSETS PROHIBITED BY ANY LANGUAGE IN THE CONSTITUTION?

No. The constitution neither expressly forbids nor expressly permits pre-trial restraint of a criminal defendant's assets. I should note, however, that in the context of summary IRS assessments courts have rejected the argument that summary levies which make the defendant's assets unavailable to pay legal fees violate the sixth amendment. Treating the reason for the defendant's financial inability as constitutionally irrelevant, the courts have concluded that when an IRS levy prevents a defendant from retaining private counsel the availability of appointed counsel resolves all sixth amendment concerns. The case law on this point is explained more fully in my written statement.

Senator GRASSLEY. Thank you, Professor Brickey. For you, Professor Brickey, the chairman had four questions that he asked me to submit to you so you could answer them in writing; and for Mr. Marek, two questions. So we will do that.

Senator GRASSLEY. And then I will also take the opportunity, instead of giving my opening statement, to just submit it for the record.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, I want to thank you for initiating this hearing on the controversial issue regarding the seizing of attorney fees, in a criminal case, on the grounds that the money represents illicit proceeds, under provisions of the 1984 Crime Control Act.

Although it isnot clear under the law that attorney fees can be treated as proceeds, and consequently forfeitable, the Justice Department has made this interpretation and has attempted to implement it. Nevertheless, the Courts have split on the issue.

Defense lawyers have argued, and some courts have agreed, that fee forfeiting violates a defendant's sixth amendment right to counsel. On the other hand, prosecutors contend that the right to use ill-gotten gains for counsel fees is not constitutionally protected, and that attorneys should be held responsible for finding out the source of funds that a criminal defendant uses for payment.

The President's Commission on Organized Crime has found that certain lawyers have substantially involved themselves in complex criminal enterprises, including money laundering, providing offices for illicit meeting places, and providing counsel to minimize legal exposure. This kind of unethical and illegal behavior must be effectively dealt with, while preserving and protecting basic constitutional rights.

I look forward to our investigation into this matter, and I want to thank today's distinguished witnesses for their testimony.

Thank you Mr. Chairman.

Senator GRASSLEY. Thanks to both of you.

Meeting adjourned.

[Whereupon, at 12:19 p.m., the committee was adjourned.]

○